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# Creating the Public Forum

Samantha Barbas

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The public forum doctrine protects a right of access—"First Amendment easements"—to streets and parks and other traditional places for public expression.[1] It is well known that the doctrine was articulated by the Supreme Court in a series of cases in the 1930s and 1940s.[2] Lesser known are the historical circumstances that surrounded

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1. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, SUP. CT. REV 1, 13 (1965).

2. On the history of the public forum doctrine, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT, ch. 6; Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis*: *Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Geoffrey R. Stone, *Fora Americana: Speech In Public Places*, SUP. CT. REV. 233 (1974); Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In*

its creation. In a new, modern world where the mass media dominated public discourse—where the "soap box . . . [had ceded] to the radio and political pamphlet[s] to the monopoly newspaper[s]"[3]—critics expressed deep anxieties that mass communications had undermined the possibility of widespread participation in politics, public life, and democratic "public discussion."[4] The public forum doctrine was one response to this concern.

This article describes the development of the public forum doctrine in the context of a larger story about the nation's efforts in this period to come to terms with its first modern crisis of communication. This crisis was precipitated by dawning public awareness of the fundamental contradiction of mass communications: that the mass media had become indispensable to public discussion yet at the same time deeply threatened it. Without the mass media, a culturally diverse and geographically dispersed public could not communicate across social and spatial boundaries. At the same time, the mass media undermined the public's ability to communicate meaningfully. The street-corner preacher and soapbox orator could not compete with the mass media for a public audience. Poor and disfavored groups could not use the media to express their views, and media owners skewed the news to suit their political interests.

This crisis of communication became a crisis in freedom of speech. In the 1930s, the Supreme Court identified the paramount values of the First Amendment as freedom of expression and freedom of public discussion.[5] Government noninterference with private expression, the Court assumed, would lead to robust and open public discussion of political affairs, the essence of democratic self-governance.[6] Yet the rise of vast media empires in the 1930s demonstrated how an unregulated press could distort public opinion and quash the expression of non-media speakers. By World War II, the Court and the public had acknowledged the tensions between freedom of expression and the ideal of public discussion in the mass media age.[7] This was the paradox of the modern First Amendment, and its recognition marked a turning point. It

*Defense of Categories*, 1992 SUP. CT. REV 79 (1992); Richard T. Pfohl, Hague v. CIO *and the Roots of the Public Forum Doctrine: Translating the Limits of Powers into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533 (1993).

3. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967).

4. *Id.* at 1641-47.

5. *See, e.g.*, Barron, *supra* note 3.

6. *See, e.g.*, Barron, *supra* note 3.

7. *See, e.g.*, Barron, *supra* note 3.

spawned a contentious national debate on the meaning of freedom of speech under the new system of modern mass communications—radio, motion pictures, and mass publishing.

One byproduct of this dialogue was an affirmative theory of the First Amendment as a state obligation to provide the public with the means to carry out public discussion.[8] Advocates of this view argued that freedom of speech had a necessary economic component.[9] When privately-owned media companies controlled the means of communication, economic inequalities were communicative inequalities. The government must compel privately-owned media to facilitate the speech of non-media speakers and itself provide alternative means of communication to those unable to access the media.

The centerpiece of this vision was the concept of the democratic public forum. I use the term "public forum" to refer to any venue, privately or publicly owned, that is devoted to public discussion—the exchange of diverse and competing views on matters of public concern—and to that end, facilitates the speech of groups and individuals who would not otherwise have access to communications media. The public forum is both a *site* for public debate and a *means* of communication for the less privileged. In the 1930s and 1940s, intellectuals and activists sought to enlist the state in the creation of "public forums" on the radio, in print journalism, and in public space.

This article examines this public forum movement and its enduring impact on the free speech doctrine and social thought. The period between 1930 to the end of World War II saw the emergence of what remain contested questions: the extent to which freedom of speech protects access to the means of communication, and the role of the state in correcting the inequalities in the ability to communicate produced by the mass media.[10] I want to complicate the existing historiography of freedom of speech by embedding the development of the doctrine within the social history of mass communications. The foundational free speech principles articulated in this period were not only the result of a national conversation about rights, but a parallel dialogue about the

8. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA. L. REV. 1405, 1410 (1986); Stanley Ingber, *The Marketplace of Ideas: A Legitimating Myth*, 1984 DUKE L. J., 1, 8-10 (1984).

9. *See, e.g.*, sources in note 8, *supra.*

10. *See, e.g.*, *infra* note 11.

social impact of mass communications and their transformation of the meaning of democratic speech.[11]

This article also illuminates the historical origins of the "market dysfunction" argument that has dominated recent First Amendment debates—that the ideal of democratic self-governance cannot exist alongside "monopoly control of the media, [and] access limitations suffered by disfavored or impoverished groups"[12] and that the state must "counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy."[13] This critique did not originate in the latter twentieth century but was developed in the World War II era.[14] The public and the courts in this period were not in the thrall of a "romantic" vision of freedom of speech, as they have been accused—gripped by a belief that "the 'marketplace of ideas' is freely accessible"[15]—nor entirely insensitive to the problem of average citizens getting ideas before a public audience.[16] Rather, they were conscious of the perils posed by concentrated ownership of mass communications and the fact that the mass communication industries hindered if not foreclosed public access to the means of effective public communication.

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11. In this era, the Supreme Court adopted the modern civil libertarian interpretation of freedom of speech—that because of its intimate connection to the democratic process, freedom of speech occupied a "preferred position" in the scheme of constitutional liberties that warranted heightened judicial solicitude. As Harry Kalven, Jr. has written, this was the period when "speech starts to win." *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA, 167 (Jamie Kalven ed., 1988). *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299 (1996); STEVEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2008); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1 (2000); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991).

12. Ingber, *supra* note 8, at 5.

13. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987).

14. For the work of latter twentieth century First Amendment scholars, see Barron, *supra* note 3; Fiss, *supra* note 13; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

15. This was the critique leveled by Barron in his pathbreaking 1967 article *Access to the Press*. According to Barron, "[o]ur constitutional theory is in the grip of a romantic conception of free expression." "While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression." Barron called for "legal intervention if novel and unpopular ideas are to be assured a forum—unorthodox points of view which have no claim on broadcast time and newsspace as a matter of right are in [a] poor position to compete with those aired as a matter of grace." Barron, *supra* note 3, at 1641; *see* discussion *infra* Part IV. On the enduring impact of Barron's work, see articles published in the symposium in the *George Washington Law Review* titled *Access to the Press: 1967 to 2007 and Beyond: A Symposium Honoring Jerome A. Barron's Path-Breaking Article*, 76 GEO. WASH. L. REV. 819 (2008).

16. *See* Barron, *supra* note 3, at 1652.

Part I of this article establishes the background for the movement to create public forums for speech by examining responses to the advent of the mass media in the first decades of the twentieth century. I frame the Supreme Court's First Amendment jurisprudence in this period as part of a national debate about democracy and communication in the new mass-mediated environment. The story of the evolution of modern free speech doctrine is inextricably intertwined with the social experience of mass communications.

Part II looks at efforts to resolve the contradictions of mass communications through an affirmative theory of freedom of speech, as it came to be articulated in a nationwide effort to turn broadcasting into a public forum. A broadcast reform movement in the 1930s pressured the Federal Communications Commission to use its licensing authority to compel station owners to present competing viewpoints on public affairs in the interest of "public discussion." The constitutional rationale for this was the "scarcity doctrine"—because of the limited number of radio frequencies, the government could, consistent with the First Amendment, supervise broadcast content in order to facilitate the dissemination of diverse views to the public and the inclusion of all social groups in public discourse. Despite the acceptance of the scarcity rationale by the courts and the Commission, radio never became the public forum that the reformers desired.

Part III looks at a similar campaign to turn newspapers into public forums through right of access laws and balanced content requirements enforced by the state. This effort foundered on the historical tradition against state interference with editorial control over press content and prior restraints on publishing. By 1945, the Supreme Court had concluded, and media reform advocates conceded, that the only mechanisms to achieve viewpoint diversity in print journalism, consistent with the First Amendment, were antitrust enforcement to diversify ownership and social pressure on publishers to fulfill their public obligation to present a wide range of views.[17]

Part IV looks at the Court's acknowledgement of the link between economic and communicative inequalities, and the tension between the ideals of freedom of expression and public discussion, in its development of the public forum doctrine. The public forum cases interpreted the First Amendment to guarantee access to certain kinds of public property for expressive purposes. This was essential, the Court

17. *See infra* Part III.

suggested, because of mass media's domination of public discourse.[18] Because average citizens could not use the mass media for communication, and because the First Amendment did not permit a right of access to privately owned communication facilities, freedom of speech protects a right to reach a public audience in the streets, commons, and parks.[19]

## I. THE PARADOX OF MASS COMMUNICATIONS

In the early twentieth century, the introduction of new media technologies into American society altered virtually every dimension of public and private life. The nation's love-hate relationship with the mass media began. Critics recognized that the mass media had become essential for communication in the vast and diverse nation that the United States had become.[20] Yet at the same time, the media undermined the average citizen's ability to participate in politics, community, and public life. This contradiction lies at the core of the history of mass communications and modern freedom of speech. It preoccupied the people who lived through this social transformation. The American people were awash in a sea of communications, as historian Warren Susman discusses, yet feared that the mass media had robbed them of their ability to communicate effectively.[21] Their outlook on the future of the media age was marked by "significant hopes" and "significant doubts."[22]

### *A. The Modern Communications Revolution*

During the last quarter of the nineteenth century and the first quarter of the twentieth century, the United States experienced a mass communications revolution. Old media technologies, such as newspaper printing, became cheaper and more efficient, and new communications technologies were developed and disseminated to a growing urban populace. The mass-market newspaper industry expanded dramatically beginning in the late nineteenth century.[23] Antebellum "penny papers"

18. *See infra* Part IV.

19. *See infra* Part IV.

20. *See, e.g.*, WARREN I. SUSMAN, CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY (1973).

21. *See generally id.* at ch. 14 & 252-70.

22. *Id.* at 260.

23. PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 252 (2004).

became powerful, advertising-driven metropolitan dailies and chains, proffering so-called "yellow journalism" to audiences of millions. By 1900, there were 94 papers per 100 households; in 1927, the total circulation of daily newspapers was over 42 million, or nearly 2 per household.[24] By 1920, 90% of Americans were estimated to be newspaper readers.[25] During the early twentieth century, motion pictures became the premiere form of public entertainment, and radio entered American homes.

Criticisms of the media, and its effects on social life, were bitter and voluminous.[26] Social elites claimed that publishers corrupted public morals by pandering to the vulgar tastes of the working classes with sensationalism, scandal, and lies.[27] Progressive reformers also launched a political critique of the media: journalism posed a threat to democracy because publishing had become a big business, and publishers distorted the news to serve the interests of capital.[28] Mass media had become—dangerously—the public's sole outlook on reality. As the critic Walter Lippmann had written, "the quack, the charlatan, the jingo and the terrorist . . . flourish . . . where the audience is deprived of independent access to information."[29] And yet it was widely recognized that the media were indispensable to the workings of modern society. As journalist Will Irwin observed in 1911, "the complex organism of modern society could no more move without [newspapers] than a man could move without filaments and ganglia."[30]

The response to these concerns by the Progressive movement, which sought to ameliorate social ills through social welfare legislation, was to call for regulation of the press. Between the 1890s and the 1920s, states and municipalities passed laws that—among reforms—required journalists to sign all articles or editorials, criminally punished the printing, publishing, and selling of publications devoted to "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories

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24. For circulation figures, see ALFRED MCCLUNG LEE, THE DAILY NEWSPAPER IN AMERICA: THE EVOLUTION OF A SOCIAL INSTRUMENT 726, 729, 731 (1947).

25. *Id.* at 726, 731.

26. *See, e.g.*, Francis Fenton, *The Influence of Newspaper Presentations Upon the Growth of Crime and Other Anti-Social Activity*, AM. J. SOC., Nov. 1910, at 342.

27. *Id.*

28. *Id.* The press "'habitually and continually and as a matter of business practice every form of mendacity known to man, from the suppression of the truth and the suggestion of the false to the lie direct.'" *Id.* at 344.

29. WALTER LIPPMANN, LIBERTY AND THE NEWS 54-55 (1919).

30. Will Irwin, *The American Newspaper*, COLLIER'S, Jan.-June 1911, *reprinted in* KILLING THE MESSENGER 126 (Tom Goldstein, ed. 1989).

of deeds of bloodshed, lust or crime,"[31] and that imposed civil and criminal liability for media invasions of privacy.[32] In 1915, one writer noted a "distinct trend towards regulation of the American press."[33] "[E]very evidence that the legislator who has been looking for new fields of business to regulate has now turned his attention to the press."[34]

Claiming "freedom of the press," publishers challenged these laws, often unsuccessfully.[35] Before the 1930s, courts tended to interpret the right to freedom of speech as subservient to the greater social good, as defined by the social elite.[36] Although prior restraints were proscribed, subsequent punishment of speech that had a "bad tendency," that allegedly threatened public safety or morals, was seen a legitimate exercise of the state's police powers.[37] The bad tendency rule was applied to the press. Criminal libel, obscenity and contempt convictions involving the press were upheld against First Amendment challenge in federal courts, including the U.S. Supreme Court.[38] As Justice White had written for the majority in the 1918 case *Toledo Newspapers v. United States*, upholding the conviction of a newspaper editor for contempt of court for publishing information during a trial that was "reasonably likely" to impair the administration of justice, "the safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests and that freedom therefore does not and cannot be held to include the

31. Winters v. New York, 333 U.S. 507, 522-23 (1948) (Frankfurter, J., dissenting).

32. *See* LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES 1880-1920, 65-67 (1993).

33. *Regulating the Press*, THE NATION, Apr. 1, 1915, at 348.

34. *Id.*

35. *See, e.g.*, State v. McKee, 49 L.R.A. 542 (1900); *In re* Banks, 56 Kan. 242 (1895); State v. Van Wye, 136 Mo. 227 (1896); State v. Pioneer Press, 100 Minn. 173 (1907).

36. The entire entry on freedom of the press in a 1901 encyclopedia stated that it "consists in the right to publish, with impunity, the truth, with good motives and for justifiable ends, whether it respects governments or individuals." It did not protect publications that "from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice . . . may injuriously affect the standing, reputation, or pecuniary interests of individuals." FELDMAN, *supra* note 11, at 234.

37. State laws were analyzed under state constitutional provisions that paralleled the First Amendment. It was not until 1925, in *Gitlow v. New York*, 268 U.S. 652, 666-67 (1925), that the First Amendment, through the Fourteenth, was made binding on states. For the authoritative account of the history of free speech before the 1930s, see DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

38. In the 1907 case *Patterson v. Colorado*, the Supreme Court upheld a finding of criminal contempt, noting that the First Amendment did not limit subsequent punishment of speech that impeded the proper administration of justice—only prior restraints. 205 U.S. 454 (1907). *See* Fox v. Washington, 236 U.S. 273 (1915); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

right virtually to destroy such institutions."[39] Liberty of the press, courts were fond of saying, was not to be used as a license for its abuse.[40]

### *B. The Optimistic View: Freedom of Expression and Public Discussion*

A civil libertarian movement in the World War I era challenged these content-based restrictions on speech and press. In the process, it reframed the First Amendment in terms of the social interest in "public discussion," the basis of the democratic process. The ideal of public discussion was used to justify state noninterference with private speech and the workings of the press. The assumption was that when citizens and editors were allowed to speak freely, without the threat of official punishment, public debate would flourish, and through it, the people would govern themselves.

The Progressive movement had supported the government crackdown against dissenters during World War I, claiming the interests of society as a whole trumped individual liberties.[41] Yet Progressive intellectuals at the vanguard of an emergent civil libertarian movement—philosopher John Dewey, Harvard law professor Zechariah Chafee, and Louis Brandeis, among the most notable—challenged the Espionage and Sedition Acts and criticized the suppression of speech that did not pose a clear and present danger to public safety.[42] Prewar movements for freedom of speech had characterized it as an individual liberty akin to freedom of contract. This was anathema to the Progressives' deep hatred of the *Lochner*[43] decision and their advocacy of social welfare legislation and extensive legislative control over economic affairs.[44] The Progressive civil libertarians resolved this dilemma by resting the basis of free speech on the social interest in free speech, which they described as public participation in democratic public discussion.[45]

In his 1920 book *Freedom of Speech*, Chafee, who would remain a leading public intellectual and free speech theorist for over thirty years, also described a "search for truth" rationale that saw freedom of speech

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39. *Id.*

40. *Id.* at 419-20.

41. MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM, 76 (1991).

42. *See generally id.*

43. Lochner v. New York, 198 U.S. 45 (1905).

44. *See* Graber, *supra* note 41, at ch. 2 & 3.

45. *Id.*

as necessary for the "social interest in the attainment of truth, so that the country may . . . adopt the wisest course of action."[46] Justice Oliver Wendell Holmes would use this reasoning in his famous 1919 dissent in *Abrams v. United States*.[47] Only when individuals are able to express themselves freely without state interference, he wrote, could there be "free trade in ideas," with the best ones winning in the competition.[48] Yet it was the public discussion model, which linked free speech to democratic deliberation, which became the leading justification for the expansion of free expression rights by the Supreme Court in the 1930s. As Justice Brandeis wrote famously in his concurrence in *Whitney v. California*, the individual's liberty to speak was not only valuable in its own right, but as a means of fostering the public discussion necessary for democratic self-governance.[49] Participation in public discussion was the duty of every citizen in a democratic society.[50]

In a string of cases, even before the "1937 turn" and the Roosevelt appointees, majorities on the Court used the concept of "freedom of discussion" to invalidate the convictions of religious minorities, socialists, communists, and union activists under state laws restricting various forms of public speech that did not pose a clear and present danger to public safety.[51] "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system," the majority noted in *Stromberg v. California*, from 1931.[52] Because free expression is "the matrix, the indispensable condition, of nearly every . . . form of freedom,"[53] freedom of speech occupied a "preferred position" in the scheme of constitutional liberties that warranted heightened judicial solicitude.[54] State action that infringed free expression and "free discussion" by regulating speech on the basis of content was now presumed unconstitutional.

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46. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 36 (1920).

47. 250 U.S. 616 (1919). As Holmes wrote, "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 630.

48. *Id.* at 630.

49. 274 U.S. 357, 372-80 (1927).

50. *Id.* at 375.

51. *See e.g.*, Stromberg v. California, 283 U.S. 359 (1931).

52. *Id.* at 369.

53. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

54. On the "preferred position" theory on the Court in this era, see White, *supra* note 11, at 330-32.

The threat of punishment chilled expression; when it was removed, the Court assumed, the natural processes of social ordering would lead to vigorous debate on public affairs.[55] State noninterference with expression would encourage the participation of all social groups, particularly minority groups, in the self-governing process.[56] In the Depression and New Deal, with the rise of organized labor, a population one-third of recent immigrant origin, and President Roosevelt's efforts to court a broad and inclusive electorate, "freedom of discussion" symbolized the Court's embrace of an emerging model of pluralist democracy—the notion of a diverse people who shared a cultural commitment to govern themselves through democratic processes characterized by fair bargaining.[57]

This connection between free expression and "freedom of discussion" presumes certain speech conditions. It assumes that, short of obstacles posed by the state, all willing speakers have the means to participate in public discourse and communicate their ideas to a public audience. By the 1930s, however, these conditions no longer existed. When the First Amendment was framed, communication was relatively cheap—starting a paper required comparatively little financial outlay and town meetings were widely attended.[58] But it did not fit the new world of mass communications, where speech opportunities were scarce, costly, and unequally distributed.[59] This realization, as we will see in Part IV, would come slowly to the Court.[60]

### *C. The Discussion Theory of the Press*

The Court's view of the press under the discussion model was optimistic: a free press leads to free discussion. In its envisioned "'world of debate about public affairs,'"[61] the press played a central role. In fact, the Court suggested, under modern conditions, public discourse and the processes of political deliberation could not take place without the press.[62]

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55. *See generally* FELDMAN, *supra* note 11.

56. *Id.*

57. *Id.* at 332-33.

58. *Id.*

59. *Id.*

60. On the disjuncture between the "Holmes" and "Brandeis" models of free speech, see SUNSTEIN, *supra* note 14, at 28.

61. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 629 (1990).

62. *See generally id.*

During the first third of the twentieth century, the United States had transformed from a rural society of discrete "island communities" to a mass society knit together by national politics and industry, the administrative state, and mass communication and transportation systems.[63] Although the culture was in many ways nationalizing and homogenizing, immigration was diversifying the social fabric and the population was disseminating across the continent. Sociologists began to recognize that communication in a heterogeneous, far-flung society could not occur in the absence of common experiences and frames of reference.[64] In modern mass society, in the absence of the directly shared activities, homogeneous backgrounds, and geographic proximity that bound together residents of the small community, the only vehicle for disseminating these systems of collective representation was the mass media. Sociologist Robert Park believed the news media could create a "general understanding and a community of interest among all parties sufficient to make discussion possible."[65] For Park, the purpose of the news was not only to represent and inform but to stimulate inquiry and dialogue—to "'make people talk.'"[66] Public opinion, the political will of the public and the basis for collective action, was a product of discourse; it emerged "from the discussions of individuals attempting to formulate and rationalize their individual interpretations of the news," he wrote.[67]

In its cases dealing with the institutional press in the 1930s and early 1940s, the Court, adopting a similar view, intimated that the most important function of the news media is to generate public discourse through the dissemination of common information on "matters of public concern," which it defined in 1941 as "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[68] As Justice Murphy observed in 1943, newspapers and radio, which surpassed traditional forms of social authority, including the school and the "pulpit," had "assume[d] a

63. *See* ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877-1920 (David Donald ed., 1967).

64. Robert E. Park, *News and the Power of the Press*, AM. J. SOC. vol. 47, no. 1, 1, 6 (1941). As Robert Post observes, "Communication requires not merely common information, but also commonly accepted standards of meaning and evaluation." Persons who do not share a minimum set of such standards simply cannot understand one another. Post, *supra* note 61, at 636.

65. *See* Park, *supra* note 64.

66. Robert E. Park, *News as a Form of Knowledge: A Chapter in the Sociology of Knowledge*, AM. J. SOC. vol. 45, no. 5, 669, 679 (1940). The essence of the news was that it would cause in the listener "a desire to repeat it to someone." *Id.* at 677.

67. Park, *supra* note 64, at 2.

68. Thornhill v. Alabama, 310 U.S. 88, 101-02 (1941).

function and responsibility of . . . wide reach and importance in the life of the nation" and become major media of "public discussion."[69] In this model of the press, the mass media allowed diverse audiences to "think about the same things at the same time and thus share a version of social reality," and created a "public community," one that perceived itself as unified by "shared . . . interests, common experience . . . , and a deep sense of interdependence," to use the words of journalism historian David Paul Nord.[70]

We can see this view of the press as an essential catalyst to public discussion in several decisions in this period extending the principle of "freedom of discussion" to justify state noninterference with journalism.[71] In *Near v. Minnesota*, the first case in which the Court applied heightened scrutiny to a law burdening freedom of press, the majority invalidated a state nuisance law that prohibited "malicious, scandalous, and defamatory" publications.[72] The law had been passed by the state legislature and enacted for specific use against a salacious and anti-Semitic Minneapolis "scandal sheet" that had viciously criticized public officials.[73] The law was aimed at stopping the excitement of scandal and material that "disturb[ed] the peace of the community."[74] The majority characterized the law as an unconstitutional prior restraint[75] and the essence of censorship.[76] In the

69. Nat'l Broad. Co. v. United States, 319 U.S. 190, 232 (1943) (Murphy, J., dissenting).

70. DAVID PAUL NORD, COMMUNITIES OF JOURNALISM: A HISTORY OF AMERICAN NEWSPAPERS AND THEIR READERS 111, 128 (2001).

71. There has been much debate about whether the Court in this period implicitly granted independent significance to the press clause. *See* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Melville B. Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What does it Add to Freedom of Speech?*, 26 HASTINGS L. J. 639 (1975); Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. L. REV. 225 (1978); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007).

72. Near v. Minnesota, 283 U.S. 697, 701 (1931). *Near* and *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936), have typically been described in terms of a Fourth Estate model of the press, which sees the constitutional function of the press as a fourth institution outside government that serves as an additional check on the three official branches by monitoring and alerting the public to governmental misdeeds. But this model, as it is described in *Near* and *Grosjean*, is also a discourse model. By focusing attention on official wrongdoing, the press creates among readers a concern with democratic governance, producing discussion leading to political action. On the watchdog or Fourth Estate model, see Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 735 (1977); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

73. *Near*, 283 U.S. at 701-04.

74. *Id.* at 709.

75. *Id.* at 723.

76. *Id.* at 713.

state legislature's view of the press, newspapers disrupted communities and public order by publishing controversial news.[77] In the Court's emerging model, a press that excited scandal by focusing attention on current events generated democratically valuable public discussion.[78] A law that prohibited the excitement of controversy and a clash of opinion was "'equivalent to a prohibition of discussions.'"[79]

The crucial relationship of the press to the shared civic consciousness necessary for public discussion was again invoked in the 1941 case *Bridges v. California*, in which a majority led by Justice Black, applying the clear and present danger test to contempt actions, invalidated the conviction of a prominent metropolitan paper, the Los Angeles *Times-Mirror*, for contempt of court for criticism of ongoing judicial proceedings.[80] The anti-labor newspaper had published an editorial that called on the state court to deny parole for two union members convicted of property destruction during a labor dispute.[81] Disputes involving labor were among the most controversial issues of the day, Black noted.[82] If reported on in the press, they would become major topics of public discussion. The strict rule on contempt removed the current controversies that commanded the most public interest from the "arena of public discussion"[83] at "the precise time when public interest in the matters discussed would naturally be at [their] height.[84] . . . when the audience would be most receptive."[85] "An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression."[86] By bringing public attention to "controversies," Black suggested, the press provided the public with the stimuli for conversation.[87] By focusing interest on labor disputes, trials, "issues and officials," the press, particularly in anonymous and fragmented urban

77. *See generally id.*
78. *See generally id.*
79. *Near*, 283 U.S. at 722. In dicta in *Grosjean v. American Press*, in which the Court struck down a Louisiana law that imposed a license tax on advertising for the highest circulation papers in the state, Justice Sutherland noted the essential role of the press in focusing readers' attention on "common interests," allowing the public to "unite[ ] for [its] . . . common good" as "members of an organized society." 297 U.S. 233, 243 (1936).
80. 314 U.S. 252 (1941).
81. *Id.* at 271-72.
82. *Id.* at 268-69.
83. *Id.* at 269.
84. *Id.* at 268.
85. *Id.* at 269.
86. *Id.*
87. *Id.* at 268-69.

environments such as Los Angeles, created among readers the necessary sense of common identity and interest for public discussion.

There is a certain logic to this view of the modern press as necessary to public discussion, but its idealism should be obvious. It assumes that editors and publishers are driven by civic concerns rather than self-interested political objectives. It assumes that the public has the ability to respond to what it sees in the papers. These presumptions were out of step with the attacks on the media in this era. Many critics on the left in the 1930s described the mass media as incompatible with the ideal of democratic public discussion.[88]

### *D. The Pessimistic View: Mass Media and the Demise of Discussion*

As should be clear by now, American society in this period had a conflicted, even schizophrenic, relationship to mass communications. As we have seen, social scientists recognized the potential of the media to facilitate communication in a heterogeneous, dispersed mass society.[89] As Hadley Cantril and Gordon Allport noted in a 1935 study of broadcasting, radio exposed the public to new and diverse streams of thought while leveling social distinctions and creating a "community of interest," making it a "powerful agent of democracy."[90] If the popular culture of the time is any indication, strains of this same optimism were shared by the culture at large.[91] But the hopes were often overshadowed by a bleak and pessimistic view that became even darker and more cynical as the 1930s progressed. Alarmed by political developments in Europe, the rise of the American advertising industry, and what some described as Roosevelt's home-grown dictatorship, the public worried increasingly about what was described as the "propaganda menace."[92] According to critics, the mass media negated the possibility of a genuinely participatory democracy and brought about the conditions for

88. *See* discussion *infra* Part I.D.

89. On the origins of the academic field of communication studies in this period, see DANIEL J. CZITROM, MEDIA AND THE AMERICAN MIND: FROM MORSE TO MCLUHAN (1982); DAN SCHILLER, THEORIZING COMMUNICATION: A HISTORY (1996); MASS COMMUNICATION AND AMERICAN SOCIAL THOUGHT: KEY TEXTS, 1919-1968 (John Durham Peters & Peter Simonson eds., 2004) [hereinafter KEY TEXTS].

90. Hadley Cantril & Gordon Allport, *The Influence of Radio upon Mental and Social Life, from The Psychology of Radio* (1935), *reprinted in* KEY TEXTS, *supra* note 89, at 111.

91. On the public's fascination with issues and themes revolving around communication, see SUSMAN, *supra* note 20.

92. KEY TEXTS, *supra* note 89, at 81.

fascism—the subversion of the popular mind by political and corporate interests.[93]

Media criticism came to constitute its own literary genre and cottage industry in the 1930s. It is difficult to summarize the many, diverse critiques of mass communications that filled the pages of books and academic journals, but they might be grouped under two broad themes. One was a structural critique: concentrated, private ownership of newspapers and radio stations produced a dangerous ideological homogeneity that distorted and biased the news. Another line of criticism focused on the media's impact on interpersonal relationships. Audiences tuned out from public affairs, avoided face-to-face interaction with their peers, and instead immersed themselves in silent, solitary consumption of the media's distorted, fantastic unreality. The upshot was the demise of community, public engagement in social life, and the democratic process. Through their monopoly over the means of communication and the wellsprings of public thought, the mass media would create a public that was mute and passive, one that ceded control over political governance and public morals to the self-interested owners and operators of the communication industries.

1. The Evils of Concentration

The *Atlantic Monthly* held a contest for readers on the subject of press freedom, and the winning entry is revealing: the media were no longer "trustees of constitutional liberty," the prizewinner wrote, but "the beneficiaries of a special privilege tending to be concentrated in fewer and fewer hands."[94] The 1930s saw the rise of the one-paper town, network radio, and the multimedia chain. High entry costs to publishing led to a declining number of daily newspapers in the face of the highest circulations on record.[95] From 1930 to 1944, while daily newspaper circulation rose from 39 to 46 million, the number of dailies dropped more than 10%.[96] By 1941, of the about 900 commercial radio stations that had been licensed, 730 of them were gathered into one of the four major networks.[97]

Never before had newspapers been so wholly dominated by concentrated business interests. The pro-business bias of the major

93. *See, e.g.*, KEY TEXTS, *supra* note 89, at 81-82.

94. Margaret A. Blanchard, *The Hutchins Commission, The Press and the Responsibility Concept of Journalism,* JOURNALISM MONOGRAPHS, no. 49, May 1977, at 18.

95. *See generally* MORRIS L. ERNST, THE FIRST FREEDOM (1946).

96. *Id.* at 78.

97. *Id.* at 127.

papers allegedly appeared not only in editorial content but also in news reporting. Publishers, who saw the New Deal as a threat to their financial interests, attacked President Roosevelt and organized labor. Robert McCormick's *Chicago Tribune* declared that "'a New Deal vote is an invitation to murder' and depicted FDR alongside Mussolini, Stalin, and Hitler as the Four Horsemen of the Apocalypse."[98] Waving the banner of freedom of the press, publishers fought against the application of new federal social welfare and labor laws to the press. Among their assaults on the New Deal, the major publishing associations brought unsuccessful First Amendment challenges in court against the National Labor Relations Act and the Fair Labor Standards Act.[99] Public resentment mounted. Hearst, Pulitzer, and the other major publishers were attacked as "lords of the press" who wielded power for their own ends and propagated their own opinions, especially in matters of politics and economics.[100] It was widely believed that the press was the single greatest influence over public opinion, and that the public mind had fallen under the sway of the "despotism" of publishers who dealt in "half-truths or whole lies."[101]

According to left-wing critics, the major publishers had effectively created an airtight system of ideological uniformity. With the publishing industry largely concentrated on the right, there was no "clash of opinion" between newspapers, depriving the public of the opportunity to hear competing views. Nor were there discussions of diverse perspectives on public affairs within any given newspaper or broadcast. The partial view of society presented in the media distorted public opinion in favor of the status quo.[102] Because newspapers and broadcast stations were under no duty to sell or offer space to the public, minority voices never appeared. "There were and are . . . groups in their communities who never can get their aspirations, their points of view,

98. Stephen Bates, *Realigning Journalism with Democracy: The Hutchins Commission, Its Times, and Ours*, *available at* http://www.annenberg.northwestern.edu/pubs/hutchins.

99. *See* Blanchard, *supra* note 71, at 228 n.12.

100. *See generally,* O.W. Riegel, *Propaganda and the Press*, ANNALS OF AM. ACAD. OF POL.AND SOC. SCI., May 1935, at 201.

101. George Fort Milton, *The Press and Public Opinion: The Function of The Newspaper*, PUBLIC OPINION Q., Jan 1938, at 55-56.

102. As news of religious and ethnic persecution in Europe reached American audiences in the latter 1930s, and as domestic labor conflict reached new heights, liberal social critics focused increasingly on intergroup relations and the political and cultural dimensions of the minority experience. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287, 1298-99 (1982).

printed in the columns of these newspapers," complained Oswald Garrison Villard, former editor of the *Nation*, in 1938.[103]

When the First Amendment was adopted, presses were cheap, and "anybody with anything to say had comparatively little difficulty in getting it published," one critic wrote.[104] If a publisher wanted to use his paper as his own personal soapbox, there was little danger to the public, because opponents could start another publication,[105] or "various opinions might encounter each other in face-to-face [public] meetings."[106] This open and accessible system of public debate had become a vestige of the past. The media were the gatekeepers to the public mind, the engineers of public opinion. The average citizen's ability to address a public audience was entirely at the sufferance of the media owners.

2. Alienation and Disengagement

While the concentration of the media in the hands of the economic elite thwarted democracy by prohibiting diverse social groups from accessing the means of public communication, the media also impeded democratic participation by distorting the human relationships that made meaningful communication possible. This critique of the media had flourished in the 1920s and persisted in the academic thought and popular culture of the 1930s.[107] Although John Dewey believed that the power of the media could be harnessed to reinvigorate social relationships and create the "Great Community," mass communications—"relatively impersonal and mechanical"—could also erode the "depth of close and direct . . . attachment" between people.[108] As sociologist Ernest Burgess commented in 1928, when people depended on the media, rather than their communities, as a source of information and companionship, the possibility of intimate and sympathetic interpersonal communication was destroyed.[109] In Dewey's

103. Oswald Garrison Villard, *Freedom of the Press*, PUBLIC OPINION Q., Jan. 1938, at 58.

104. THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAIZINES, AND BOOKS 14 (1947) [hereinafter THE COMMISSION ON FREEDOM OF THE PRESS].

105. *Id.*

106. *Id.* at 15.

107. *See* KEY TEXTS, *supra* note 89, at 15.

108. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS, 98, 143, 213 (1927).

109. E.W. Burgess, *Communications*, AM. J. OF SOC., vol. 34, no. 1 (Jul. 1928).

words, mass communications "disintegrated the small communities of former times."[110]

Media critiques were filled with accounts of the subversion or destruction of traditional community rituals by the solitary, superficial practices of media consumption.[111] In their famous 1929 sociological study of Muncie, Indiana, published as *Middletown*, Robert and Helen Lynd had observed how public oratory, once a major form of public entertainment, had been replaced by newspaper and magazine reading.[112] Unlike the public lecturing that took place at summer picnics and fairs, with their opportunities for public interaction and conviviality, the media so avidly consumed by Muncie residents were produced entirely outside the community.[113] Rather than discuss ideas with their neighbors, people turned on the radio. "For every individual who listens to a street corner address, there are tens of thousands who listen to a radio speech," one critic lamented.[114] The media had diverted the attention of the public away from important concerns that affected the local community to big-city ideas and consumer values. Novelist Sherwood Anderson, in his work *Winesburg, Ohio*, noting that mass media had "worked a tremendous change in the lives and the habits of thought of our people of Mid-America," observed that even the simple farmer no longer spoke his own words but had become a mouthpiece for the press.[115] He parroted what he had read in the papers, "talking as glibly and senselessly as the best city man."[116]

The mass media often bore the brunt of a more generalized criticism of modernity, urbanization, and mass culture.[117] The media were both agents and symbols of the demise of traditional ways of life. Because of the radio, one writer lamented, "Town meetings are for the most part regarded as relics of the horse and buggy days."[118] Critics linked the rise of mass communications to the demise of face to face meetings, oral discussion, and the public forum—the intimate settings

110. DEWEY, *supra* note 108, at 127.

111. *See, e.g.*, KEY TEXTS, *supra* note 89.

112. *Id.* at 60.

113. Robert S. Lynd & Helen Merrell Lynd, *From Middletown: A Study in Contemporary American Culture* (1929), *reprinted in* KEY TEXTS, *supra* note 89, at 60.

114. ACLU Brief at *5, Nat'l Broad. Co. v. United States, Nos. 554, 555 (U.S. Feb. 2, 1943), 1943 WL 71849.

115. SUSMAN, *supra* note 20, at 260.

116. Sherwood Anderson, WINESBURG, OHIO (1919), *quoted in* Susman, *supra* note 20, at 260.

117. The national media—newsmagazines, radio broadcasts, syndicated columns — encouraged communities to "orient themselves outward," as did chain stores, national brands, and the centralization of government power under the New Deal. Bates, *supra* note 98.

118. ACLU Brief, *supra* note 114, at *5.

and relationships that were seen as necessary for democratic participation to flourish.[119]

3. The Critical Need for Public Forums

Mass media's perceived monopoly over popular consciousness and the means of communication led to a movement in the 1930s to democratize communication. This "public forum movement," as I call it—a diverse and diffuse body of lawyers, activists, and intellectuals—sought to counter the media's distorting effects on public discussion. They did so by encouraging alternative, non-media forms of communication, and seeking legal means to compel the mass media to facilitate the expression of minority speakers, particularly those that challenged the interests of big business. These critics proposed that the mass media be legally required to serve as "public forums," venues where speakers representing all social groups could express their ideas and competing perspectives on public affairs could be discussed and debated.[120] Because media owners, on their own accord, would never subsidize the speech of groups hostile to their political interests—or offensive to their audiences and advertisers—the only way these forums could be created was through government involvement. The state must impose requirements that the media cover public issues from all points of view and grant access to minority speakers, even if this meant denying other speakers' requests for airtime or newspaper space.

Because Progressive civil libertarians in this period did not frame freedom of speech solely in terms of autonomy interests, as in later years, but as a positive right to participate in self-government, the state was not yet "an enemy."[121] Many associated the protection of civil liberties with economic and social justice, which could be secured through social welfare legislation. By creating the material conditions for the effective exercise of speech rights, the government could affirmatively advance the goals of the First Amendment. As historian Laura Weinrib writes, the 1920s and 1930s was a transitional period in the history of civil liberties in which the right to free speech was not entirely negative but was "nonetheless countermajoritarian."[122]

119. *See generally* ZECHARIAH CHAFEE, JR., 2 GOVERNMENT AND MASS COMMUNICATIONS (1947).

120. See examples throughout article.

121. Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 LAW & SOCIAL INQUIRY 187, 201 (2009).

122. *Id.*

In his influential treatise *Government and Mass Communications,* Chafee argued that the First Amendment permitted the government to expend resources on communication facilities for private speech.[123] He advocated state-created "physical facilities for communication" in the form of "Hyde Parks," auditoriums, and meeting halls.[124] But the state could not constitutionally dictate the expressive uses of privately owned media, Chafee insisted.[125] Yet other liberal intellectuals and activists argued that the First Amendment allowed the state to compel privately-owned communication facilities to provide minimum access to the public and to present the views of underrepresented groups.[126] This affirmative view of freedom of speech was developed and used in campaigns to turn the radio and newspapers into public forums.[127]

## II. RADIO AS A PUBLIC FORUM

### *A. The Broadcast Reform Movement*

Broadcasting was in many ways the most appropriate "place" to create a public forum in the 1930s. Most American families owned a radio and broadcasting had become the focal point of public attention, a major source of news and entertainment, and a medium for national politics.[128] When broadcasting was introduced in the 1920s, it was predicted to have great democratic and educational potential.[129] Its wide dissemination, the minimum financial outlay it demanded from listeners, and the fact that it was transmitted directly into the home made it the "most powerful instrument of social education the world has ever seen."[130] Radio gave the public easy access to information about public affairs. Many envisioned that the radio would integrate rural Americans, the elderly, immigrants—society's outsiders—into the mainstream social fabric.[131] When marginalized groups turned on the radio, they

123. *See generally* CHAFEE, *supra* note 119.

124. *Id.* at 479.

125. *See* GRABER, *supra* note 41, at 162-63.

126. *See generally* GRABER, *supra* note 41.

127. *Id.*

128. On the early history of radio see STARR, *supra* note 23, at ch. 10 &11.

129. *See generally* ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935 3-11 (1993).

130. *Id.* at 86.

131. *See generally id.;* and George V. Denny, Jr., *Radio Builds Democracy*, J. OF EDUC. SOC., vol. 14, no. 6, Feb. 1941.

participated in a shared cultural ritual and took their place in a national community of listeners.[132]

By the mid-1930s, however, it was widely recognized that radio had not lived up to its democratic potential. Radio had become almost entirely commercial, and ad agencies wrote and controlled major broadcast programs. The critiques of partisanship, concentrated ownership, and viewpoint homogeneity applied equally to radio as print journalism. The networks dominated the airwaves, and during the 1930s, newspaper-radio cross ownership became increasingly common. By 1940, out of 897 licensed stations, 298 were associated with newspapers.[133] Perhaps even more than print journalism, radio broadcasting was said to exert a totalizing force over public discourse.

The major difference between broadcast and print journalism was broadcasting's tie to the state. Congress, in the Radio Act of 1927, asserted that the government owns the airwaves and may license them to licensees to hold in trust for the benefit of the people.[134] Broadcast stations were privately owned and had the right to exclude others from their segment of the airwaves, but their right to operate was granted and conferred by the government. In granting licenses to broadcast stations, the Federal Radio Commission, the administrative agency created by the Act, was supposed to consider a variety of factors, including the financial and technical qualification of the applicant, the applicant's character, and whether it met the "public interest" standard.[135] In exchange for the free and exclusive right to use part of the radio frequency spectrum, licensees were obliged to air programming in the "public interest"—that would serve the "public convenience, interests, or necessity."[136] Congress left it to the Commission to define the standard. In 1934, Congress passed the Communications Act, the successor to the Radio Act, and delegated regulatory power to the Federal Communications Commission, the FRC's replacement.[137]

132. Denny, *supra* note 131.

133. *The Guild Reporter*, ACLU PAPERS (Mar. 15, 1942), *microformed on* American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950, MFILM N.S. 15069, GUIDE JC599 .U5 A445 1996 (Scholarly Res.).

134. Radio Act of 1927, 44 Stat. 1162.

135. *Id.*

136. *Id.* at 1163. On the history of the "public trustee" doctrine, see Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J. L. REFORM 149 (2005) 154-57.

137. 47 U.S.C. § 301.

A section of the Federal Communications Act explicitly prohibited government censorship over radio content.[138] It stated that nothing "shall be understood . . . to give the Commission the power of censorship over the radio communications" and that "no regulation or condition shall be promulgated . . . by the Commission which shall interfere with the right of free speech by means of radio communication."[139] And yet the public interest licensing standard implied FCC authority to exert content-based discrimination. Although the FCC never clearly defined the standard, early on, it equated the "public interest" with commercial broadcasting. In a 1929 order, the Radio Commission determined that the stations that best served the public interest were those that served the "entire listening public within the listening area of the station."[140] This meant "general public service" stations—commercial stations—rather than what it described as "propaganda" or political stations.[141] Following the implementation of this order, license applications from noncommercial broadcasters were routinely denied.[142]

In the early 1930s, civic, religious and labor groups mobilized in opposition to the FRC's strictly commercial interpretation of the public interest standard. The most vocal advocates included the Chicago Federation of Labor, the Pacific-Western Broadcasting Federation, a nonpartisan coalition supported by a variety of civic and religious groups, and the American Civil Liberties Union.[143] Their goal was a policy requiring the set-aside of a certain portion of the spectrum for noncommercial broadcasting.[144] They believed that radio must serve as a public forum for communication, one accessible to speakers of all backgrounds and interests, and that this could never be achieved under a purely commercial system.[145] They rallied behind the Wagner Hatfield Amendment to Communications Act, which had proposed a set aside of 25% of all radio facilities for the use of nonprofit organizations.[146] In the face of opposition from the networks and the American Bar

138. 47 U.S.C. § 326 (1934).
139. 47 U.S.C. § 326 (1934). *See also* Radio Act of 1927, 44 Stat. 1172-73.
140. *See* MCCHESNEY, *supra* note 129, at 27.
141. *Id.*
142. *Id.* at 26.
143. *Id.* at 63.
144. *See generally id*. at ch. 4.
145. MCCHESNEY, *supra* note 129, at ch. 4.
146. *Id.* at 75.

Association, the proposal failed.[147] American broadcasting became a system dominated by nationwide chains supported by commercial advertising.[148] The radio reform efforts intensified.

### *B. The ACLU and the Radio Public Forum*

Of all the interest groups in the broadcast reform movement, the ACLU, the focus of this section, was most cognizant of the constitutional dimensions of radio regulation and worked actively to define a principle of freedom of speech in the broadcasting context.[149] The civil libertarian organization had been created in the wake of the post World War I Red Scare in the interests of securing the speech rights of society's least popular and most marginalized groups—organized labor, socialists, anarchists, racial minorities, even the Ku Klux Klan. Its founding and affiliated members included the many of the most esteemed Progressive lawyers and legal academics of the time.[150] At the head of the ACLU's broadcast reform effort was Morris Ernst, a New York civil liberties lawyer best known for his fight against censorship. Within the ACLU, Ernst was known as a liberal individualist who defined freedom of speech in negative terms.[151] In the radio context, however, Ernst urged state involvement in broadcast content as a means to achieve the necessary material conditions for public discussion and the participation of minority groups in public debate.[152]

In the 1930s, Ernst and the ACLU's Radio Committee[153] feared two different kinds of censorship. The first was government censorship—the

147. Many of the top members of the ABA Standing Committee on Radio had connections to the networks. *See id.* at 131.

148. *Id.* at 129.

149. Yet as communications historian Louise Benjamin notes, "freedom of speech" was mobilized by virtually every interest group with a stake in radio, from government regulators to broadcast stations to political opposition groups. Every group devised its own constitutional or quasi-constitutional rationale to support its interests. *See* LOUISE M. BENJAMIN, FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935 (2001).

150. Including Roger Baldwin, a leader of the American Union Against Militarism, which opposed American involvement in World War I, the radical feminist and pacifist Crystal Eastman, and Walter Nelles, a former corporate attorney in New York. Zechariah Chafee had worked closely with the ACLU. *See* David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 100-01 (1992).

151. Laura M. Weinrib, *Lawyers, Libertines, and The Reinvention of Free Speech, 1920-1933* (2009), *available at* http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyulawwebsiteacademicscolloquialegal_history/documents/documents/ecmpro063101.pdf.

152. *See* MCCHESNEY, *supra* note 129, at 81.

153. The Radio Committee was formed in 1933. The ACLU also had a committee called the National Council on Freedom from Censorship, formed in 1931, which was also active in radio censorship issues. *See id.* at 82; BENJAMIN, *supra* note 149, at 192.

FCC's denial or revocation of a broadcast license to politically unpopular or controversial broadcasters. In 1931, the ACLU got involved in the case of pastor Bob Shuler, who used broadcasts on his station to make defamatory attacks on public officials, Catholics, and Jews.[154] The FRC denied his application for license renewal, and with the help of the ACLU, Shuler appealed the decision on free speech grounds. The D.C. Circuit affirmed the FRC's decision, stating that the First Amendment did not prohibit the Commission, in the public's interest, from denying licenses to those who used the radio for defamation.[155] The Shuler case, the first case in which a federal court dealt directly with the constitutional issue of freedom of speech over the air, affirmed the authority of the FRC to consider past program performance at license renewal time.[156] During the 1930s, the ACLU continued to devote much of its attention to contesting license denials of stations that broadcast politically controversial views.[157]

Yet at the same time, the ACLU Radio Committee encouraged the FCC to make content-based licensing decisions in an effort to eradicate "private censorship" of the airwaves by station owners.[158] The ACLU had conducted a series of studies in which it found numerous cases of radio stations refusing time to unpopular political groups or forcing them off the air.[159] In 1935, the Radio Committee described censorship at the stations by the managers, rather than government censorship, as the primary threat to free speech on the radio.[160] The Committee advocated, either by statute or regulation, the creation of a "public interest" standard that would require stations to devote time to controversial issues and to present alternative viewpoints on public affairs.[161] "We have concluded—not without wistful glances in other directions, however—to abandon the notion that censorship means exclusively government censorship," the Committee wrote in a 1935 policy statement.[162] "We

154. Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932).

155. *Id.*

156. *Id.* at 851; Charley Orbison, "*Fighting Bob" Shuler: Early Radio Crusader*, 21 J. BROAD. 459 (1977); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 16 (1987).

157. *See generally* MCCHESNEY, *supra* note 129, at ch. 4.

158. *Id.* at ch. 4, 5, 6, 7, 8 & 9.

159. *Id.*

160. *Report on Radio Censorship*, ACLU PAPERS (Apr. 24, 1935), *microformed on* American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950, MFILM N.S. 15069, GUIDE JC599 .U5 A445 1996 (Scholarly Res.).

161. *See* Draft of Letter to the Members of the Federal Communications Commission (Mar. 27, 1939) (on file with author) [hereinafter Draft of Letter].

162. *Report on Radio Censorship*, *supra* note 160.

have concluded that so long as Congress has power under the Commerce Clause to regulate communication, it must and will so do according to some standard, and that, by definition, such regulation implies the power to deal with program content."[163]

This effort was a response, in large part, to the networks' refusal to sell time to organized labor.[164] In the 1930s, labor unions, one of the ACLU's major constituencies, had hoped to use radio as an organizing tool, for publicity, and to create a unified working-class culture.[165] The networks justified refusing selling time to labor by claiming that labor messages were almost always "controversial issues."[166] The National Association of Broadcasters, representing 500 member stations, had written a code of self-regulation in which it urged station owners not to sell radio time for the presentation of "controversial issues," since if stations sold time to political groups for the discussion of such issues, only groups that could afford to pay would be represented on the air, skewing public opinion.[167] The ACLU believed that this was a pretext for animus against labor and attacked the NAB code as censorship in its worst form.[168] No labor organization could buy time on the networks, although "business under the cover of sponsored programs can get its propaganda across freely."[169] The ACLU complained to the FCC, but under the Radio Act, content discrimination by station management could not be used as the basis for denying license renewal.[170] When they did sell time to labor, most stations demanded that the speakers provide advance scripts. When speakers veered from their scripts, the stations turned their microphones off.[171]

The ACLU subsequently embarked on an effort to secure the passage of equal-time and equal-access laws that it claimed would turn radio broadcasts into "open forums reaching millions" and eliminate the

163. *Id.*

164. *See* Memorandum for Labor Unions Indicating the Necessity for Supporting Bills S.2755, S.2756, S.2757 & H.R. 3038, H.R. 3038, H.R. 3039 (Dec. 1937) [hereinafter Memorandum for Labor Unions].

165. *See* ELIZABETH FONES-WOLF, WAVES OF OPPOSITION: LABOR AND THE STRUGGLE FOR DEMOCRATIC RADIO (2006).

166. Excerpts from the NAB Code Manual (1939), *reprinted in* LLEWELLYN WHITE, THE AMERICAN RADIO: A REPORT ON THE BROADCASTING INDUSTRY IN THE UNITED STATES FROM THE COMMISSION ON FREEDOM OF THE PRESS 249 (1947) [hereinafter THE AMERICAN RADIO].

167. NAB 1939 Standards of Practice (1939), *reprinted in* THE AMERICAN RADIO, *supra* note 166, at 242-43.

168. FONES-WOLF, *supra* note 165, at 91.

169. *See* Memorandum for Labor Unions, *supra* note 164.

170. *See generally* Radio Act of 1927, 44 Stat. 1162.

171. Memorandum for Labor Unions, *supra* note 164.

"unfair practice of broadcasting one-sided propaganda."[172] In 1932, Ernst and the ACLU's National Council on Freedom from Censorship had been involved in the drafting of an ultimately unsuccessful amendment to the Communications Act that would have required stations to air speakers representing both sides of important public issues.[173] In 1935, the Radio Committee drafted a bill for "Unrestricted Discussion of Public Issues," subsequently introduced by California Representative Byron Scott.[174] It attempted to enlist seventy-five educational, church, liberal, and labor organizations—what it described as a coalition of "the outs"—behind the proposed legislation.[175] The bill would amend the Communications Act to require each licensee to set aside periods on desirable times of the day and evening for "uncensored discussion on a nonprofit basis" for "social, political and economic problems, and for educational purposes."[176] The bill required that anytime a station aired a controversial issue, it must "give a hearing to at least two sides of every issue presented."[177] Licensees would be relieved of responsibility to the FCC and the courts for any defamatory statements on those broadcasts.[178] The ACLU claimed the bill would extend free speech to radio through the "*establishment of radio open forums on every station in the country*."[179]

The Scott bill failed to receive hearings at the committee level. Even the traditional liberal allies of the ACLU feared the broadcast lobby and did not want to be connected with the legislation.[180] The proposal did, however, push station owners to more frequent use of the "public forum" radio format. "Public forum" programs, which became common during the mid-1930s, were often touted as surrogates for the "Colonial 'town hall' meeting."[181] The NAB described the radio public forums as programs "wherein the clash of opinions and ideas are broadcast in a radio-forum debate so that the greatest number of citizens may hear the issues, evaluate the different opinions advanced, and act

172. *See* Memorandum, Freedom of the Air, ACLU PAPERS (1935), *microformed on* American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950, MFILM N.S. 15069, GUIDE JC599 .U5 A445 1996 (Scholarly Res.) [hereinafter Freedom of the Air].

173. BENJAMIN, *supra* note 149, at 195.

174. *See* MCCHESNEY, *supra* note 129, at 237.

175. Freedom of the Air, *supra* note 172.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. MCCHESNEY, *supra* note 129, at 237.

181. THE AMERICAN RADIO, *supra* note 166, at 246.

upon them."[182] Although stations maintained the policy of refusing to sell time on "controversial issues," the NAB Code did direct station owners to provide free time for forums devoted to the "presentation of public questions including those of controversial nature."[183] The time was to be allotted with "fairness to all elements in a given controversy."[184] When they did air, the forum programs often tried to replicate the classic town meeting—the speakers were unpolished and the debate frank.[185] However the programs' rough quality made them unpopular, and broadcasters used their low ratings as a justification for shutting them down.[186] A study in the 1940s found that only 15% of the country had been exposed to public forum programs, at the rate of about an hour a week, with half of it outside the best listening periods.[187]

After the failure of its legislative efforts to create public forums on the air, the ACLU Radio Committee turned its attention to the FCC. It urged the Commission to amend its regulations to require as a licensing condition that radio stations devote a set amount of time each week to discussion of controversial issues and that stations putting on programs involving controversial public issues extend equal time to at least one important, representative contrary view.[188] It advocated the adoption of a public interest standard that would "encourage as great diversity as possible" in program content.[189] These proposals for content-based regulation of the airwaves stirred the vocal opposition of the broadcast interests.[190] The ACLU's ideal of public discussion on the radio was a kind of managed debate in which the FCC, moderating the dialogue through its licensing conditions, made sure that particular groups were

182. *Id.*
183. *Id.* at 242.
184. *Id.*
185. *Id.* at 214-15.
186. *Id.*
187. THE AMERICAN RADIO, *supra* note 166, at 214.
188. Draft of Letter, *supra* note 161.
189. *Id.*
190. On broadcasters' opposition to broadcast reform regulation, *see* MCCHESNEY, *supra* note 129, at 117-20.

represented and that certain topics were discussed.[191] This was the essence of censorship, the broadcasters argued.[192]

In the course of these battles, the ACLU began to articulate a constitutional rationale for government involvement in radio.[193] The First Amendment ideal of public discussion demanded that the state keep open the "channels to the marketplace of ideas" and that the public have access to diverse points of view.[194] State supervision of broadcast content in this interest was constitutionally legitimate because of the structural properties of broadcasting. Because of the finite number of radio frequencies, not everyone could speak on the radio. When unpopular groups were denied space in a newspaper, they could potentially start an opposition outlet, but this was impossible in the radio context, given the constraints of the licensing system. Freedom of the press, which meant the right to unfettered editorial discretion, was different from freedom of speech on the air.

The ACLU publicized this theory in its efforts in the latter 1930s to break the major networks' hold over broadcasting.[195] Morris Ernst, who wrote a book length treatise on the topic, believed concentrated ownership of the media to be the single greatest threat to freedom of the press in modern times.[196] Although the Communications Act had provided that licenses could be revoked if a station violated the antitrust laws, by the mid-1930s it was widely acknowledged that monopolistic practices in radio were widespread.[197] In the late 1930s, the FCC, under the direction of James Lawrence Fly, appointed by FDR in 1938 to contain anti-New Deal sentiment on the radio, held hearings on radio ownership in which the ACLU participated.[198] The hearings led to new

191. This would later be described by Alexander Meiklejohn as the First Amendment model of the democratic "town meeting." Meiklejohn wrote well after the 1930s, but his model of managed debate as the ideal democratic speech situation was influenced by the broadcast reform movement. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 25 (1948). For critiques of the town meeting model, see Post, *supra* note 8, at 1114; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV 20, 40 (1975).

192. MCCHESNEY, *supra* note 129, at 117-20.

193. *See* REPORT OF THE NATIONAL COUNCIL ON FREEDOM FROM CENSORSHIP (Jan. 5, 1939).

194. ACLU Brief, *supra* note 114, at *5.

195. For a general discussion of major network monopoly, see ERNST, *supra* note 95.

196. *See id.*

197. *See, e.g.*, *id.* at 127.

198. Ernst urged the ACLU Radio Committee to support a proposed FCC rule against newspaper-radio cross-ownership, but Arthur Garfield Hays, one of the ACLU's founders and one of the most avowedly libertarian on freedom of speech, successfully opposed the proposal, claiming that it would violate the First Amendment rights of newspapers, who would have lesser rights than other potential station owners. Statement by Arthur Garfield Hays on Press-Radio Relation, ACLU

regulations that, in the interest of increasing local programming, prohibited networks from owning more than one station in any locality, gave affiliated stations the right to refuse a network program, and mandated the breakup of the two largest networks.[199] The networks challenged the rule, claiming that the FCC's role was limited to policing the wavelengths to prevent stations from interfering with each other and that any regulation beyond that was a violation of freedom of the press.[200]

In 1942, in an opinion by Judge Learned Hand, the District Court for the Southern District of New York rejected the networks' claim.[201] Hand stated that the FCC's prohibition on network contracts did not violate but furthered freedom of speech, since the interests protected were the "very interests which the First Amendment itself protects"—listeners' interest in a wide range of programming.[202] The networks appealed to the Supreme Court, and a team of five lawyers on the ACLU, including Ernst, filed an amicus brief that characterized freedom of speech as embodying an affirmative requirement that the public have "access to diverse points of view and the right to pick and choose among them,"[203] which was an essential condition of public discussion. The state had a duty to "sponsor developments which . . . encourag[e] such diversity" and discourage "bottleneck contractual devices."[204] Because of the scarcity of radio frequencies and the powerful influence of the radio over public opinion, the state must regulate broadcasting to ensure that what went over the "radio pipe lines into the market of thought" was the "product of as many minds as possible."[205]

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PAPERS (Mar. 5, 1942), *microformed on* American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950, MFILM N.S. 15069, GUIDE JC599 .U5 A445 1996 (Scholarly Res.). Hays believed this would result "in the theory that the first avenue of communication to the public which an individual selects is the only way in which he can communicate his ideas." The ACLU ultimately issued a statement, which it sent to FCC Commissioner Fly, that the Union was concerned that concentrated ownership of radio stations and newspapers "monopolized the channels of communication," but that the fact that newspapers "are engaged in dealing with information and opinion should not disqualify them as applicants for radio licenses." Letter to James Lawrence Fly, ACLU PAPERS (Apr.1, 1942), *microformed on* American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950, MFILM N.S. 15069, GUIDE JC599 .U5 A445 1996 (Scholarly Res.).

199. *See* POWE, *supra* note 156, at 32.
200. *Id.* at 33-34.
201. Nat'l Broad. Co. v. United States, 47 F. Supp. 940 (1942).
202. *Id.* at 946.
203. ACLU Brief, *supra* note 114 at *4.
204. *Id.*
205. *Id.* at *7.

In an opinion by Justice Frankfurter, the Supreme Court gestured towards the ACLU's position.[206] The structural limitations of radio—the scarcity of radio frequency—made freedom of the air different from freedom of the press. Because not everyone who wanted to speak on the radio could have access to the airwaves, it was not a violation of the First Amendment rights of broadcasters for the FCC to selectively grant licenses consistent with the "public interest."[207] The FCC was not merely to play traffic cop of the airwaves, but to determine the "composition of that traffic."[208] There were two possible interpretations of the Frankfurter opinion that were debated the time—one that the FCC could only control the "methods of competition" used by station owners, and the other that the FCC could supervise radio content.[209] Zechariah Chafee advocated the former position,[210] although the latter was widely held[211] and has since been affirmed by courts upholding the First Amendment validity of FCC regulation of broadcast programming.[212]

Freedom of the press meant an "unfettered editorial page," FCC Commissioner James Fly often said, while "freedom of the radio" meant that licensees fulfill their "duty" of free speech.[213] This duty, to present "all the facts and all points of view," was "correlative to the right of the people to hear – a right essential to the preservation of democratic processes."[214] In the 1940s, the FCC used this rationale as the justification for a public interest standard that seemed to move towards the ACLU's goal of "as great diversity as possible" on the air.[215] In 1940, the FCC issued its "Mayflower doctrine" in a case in which it denied a license to a station that had broadcast only the anti-Roosevelt

206. Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

207. *Id.* at 226-27.

208. *Id.* at 216.

209. CHAFEE, *supra* note 119, at 580.

210. *Id.*

211. "There must be government regulation of radio in order to secure freedom of speech. Otherwise private censorship might effectively exclude minority groups from the air." *Radio Censorship and the Federal Communications Commission*, 39 COLUM. L. REV. 450 (1939); *see also Radio Regulation and Freedom of the Air*, 54 HARV. L. REV. 1220 (1941).

212. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 395 (1969) (describing the decision in *NBC*: "The court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees").

213. James Lawrence Fly, *Regulation of Radio in the Public Interest*, 213 ANNALS OF AM. ACAD. POL. SOC. SCI. 102, 107 (1941).

214. *Id.*

215. Draft of Letter, *supra* note 161.

views of its owners.[216] Broadcasters had an obligation not to editorialize, to "present all sides of important public questions," and to "be sensitive to the problems of public concerns in the community and to make sufficient time available, on a nondiscriminatory basis, for the full discourse thereof."[217] The Mayflower decision was the forerunner of the Fairness Doctrine, announced by the FCC in 1949, which imposed a duty on stations to present controversial programming and to maintain an overall viewpoint balance in the programming.[218] Following pressure from organized labor, in the 1940s the FCC issued an order that essentially threw open the door to sale of time for the discussion of controversial issues.[219] In 1946, the FCC released its "Blue Book," a 149-page report that defined the public interest standard for licensing in terms of a "well-balanced program structure," the carrying of local programs, and programs devoted to public issues.[220] It stated that when ruling on a license renewal application, the FCC could consider whether time was made available for the discussion of public issues and diverse viewpoints and speakers were represented.[221]

Broadcasters attacked the new public interest standards as an infringement of their First Amendment rights, and the postwar FCC seemed to ignore the Blue Book in its subsequent orders and decisions.[222] The Fairness Doctrine was haphazardly enforced and eventually abolished by the FCC.[223] The radio reform activists of the 1930s and 1940s never saw broadcast become the public forum that they had envisioned. They had, however, transformed public understandings of freedom of speech by popularizing a new model of democratic speech in the media age and highlighting the link between the ideal of public discussion and access to the means of communication. In the 1940s, as we will see in the next sections, their ideas would be mobilized in efforts to create public forums in print journalism and public space.

216. *See* POWE, *supra* note 156, at 109-10.

217. *Id.*

218. Editorializing by Broadcast Licensees, 13 FCC 1246 (1949), *cited in* POWE, *supra* note 156, at 111.

219. THE AMERICAN RADIO, *supra* note 166, at 80.

220. *Id.* at 192.

221. *See generally id.* at 182-93.

222. POWE, *supra* note 156, at 109; Varona, *supra* note 136, at 156.

223. *See generally* POWE, *supra* note 156.

## III. THE PRESS AS A PUBLIC FORUM

### *A. Licensing the Press*

In the midst of a wave of criticism of the press, the 1930s and 1940s saw a press reform movement that paralleled the broadcast reform effort. The goal was similar—to involve the state in supervising the publishing process to ensure a wider range of viewpoints in the press. This was an essential precondition of "public discussion," the reformers argued, and the First Amendment permitted state action to achieve this interest.

Yet there were more formidable constitutional obstacles to regulating the press than radio. Content based licensing was entirely anathema to freedom of the press, as the Supreme Court had affirmed in *Near v. Minnesota*.[224] Yet press reformers argued that because of the importance of newspapers to public discourse, and the inability of average citizens to access the press as a means of communication, the licensing of newspapers was analogous to the licensing of radio and would be legitimate under the same constitutional rationale.[225] They envisioned that print journalism, like broadcasting, could serve as a forum for public discussion and the exchange of diverse views, supervised by editors guided by "public interest" criteria designed and enforced by the state.

Many of the arguments for newspapers as "public forums" originated in the work of the Hutchins Commission on Freedom of the Press. The academic commission, organized by Time-Life publisher Henry Luce in 1944, was charged with producing a comprehensive report on the performance of the press, and a practical and theoretical analysis of the meaning of freedom of the press in modern times. The Commission was headed by Zechariah Chafee and University of Chicago chancellor Robert Maynard Hutchins, and its roster included professors of law, anthropology, sociology, economics, and philosophy from the most elite universities.[226] The group met seventeen times over two years and interviewed fifty-eight witnesses.[227] By the time of its 1947 release, its final report, *A Free and Responsible Press*, had been

224. 283 U.S. 697, 713-14 (1931).

225. *See* CHAFEE, *supra* note 119, at 695.

226. Including John Clark, a professor of economics at Columbia, Robert Redfield, professor of anthropology at the University of Chicago, William Hocking, Harvard professor of philosophy, Harold Laswell, a law professor at Yale, and former Assistant Secretary of State Archibald MacLeish. *See* THE COMMISSION ON FREEDOM OF THE PRESS, *supra* note 104, at v-vi.

227. *Id.*

revised nine times, mostly because of disagreement over the constitutional ramifications of government involvement in publishing.[228] Because of the prestige of its members and the vast public interest in the topic of press freedom, the Hutchins Commission received tremendous popular and scholarly attention. *A Free and Responsible Press* remains one of the most important studies of the press in American history.[229]

The Commission began from the assumption that a reconsideration of the principles of freedom underlying the First Amendment had become a matter of urgent concern.[230] It then described the paradox of mass communications:

> The importance of the press to the people has greatly increased with the development of the press as an instrument of mass communication. At the same time the development of the press as an instrument of mass communication has greatly decreased the proportion of the people who can express their opinions and ideas through the press.[231]

The Commission concluded that the press had a social responsibility, as a condition for its freedom, to provide the public with the information necessary for responsible citizenship and to represent diverse views.[232] The press had failed this duty, it concluded.[233] Press content was inaccurate, biased towards big business, and excluded the views and opinions of minority social groups.[234] The press did not provide a credible and truthful portrayal of world affairs, nor "project[ed] the opinions and attitudes of the groups in the society to one another."[235] It had not fulfilled its social obligation to serve a public "forum for the exchange of comment and criticism" and "common carriers of public discussion."[236]

Luce, who funded the research but exercised no control over it, had initiated the Commission in his hope of attaining a definitive statement

228. *See id*.

229. LEE C. BOLLINGER, IMAGES OF A FREE PRESS 27-28 (1991).

230. *See* THE COMMISSION ON FREEDOM OF THE PRESS, *supra* note 104.

231. *Id.* at 1.

232. On the social responsibility theory of the press, see FRED S. SIEBERT, THEODORE PETERSON, & WILBUR SCHRAMM, FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO 95 (1956). "Social responsibility theory holds that the government must not merely allow freedom; it must also actively promote it." *Id.*

233. *See generally* THE COMMISSION ON FREEDOM OF THE PRESS, *supra* note 104, at ch. 4.

234. *Id.* at 21 & ch. 2.

235. *Id.* at 21.

236. *Id.* at 23.

of freedom of the press as a principle of absolute liberty in publishing.[237] This aspiration went unrealized. In fact, several Commission members went in the opposite direction and endorsed extensive government regulation of press ownership and content.[238] Some supported content based licensing and a public right to access the press.[239]

The centerpiece of this vision was a "Free Press Authority," a regulatory agency for print journalism similar to the Federal Communications Commission. The authority would license newspapers under the condition that the papers express the differing ideas, points of view, and cultural interests of each group in the community and allow the public to hear to varied interpretations and opinions regarding all major public issues.[240] This would be measured by governmentally established "yardsticks" of diversity.[241] Papers would have to devote free space to minority opinions and interests proportional to their representation in the community.[242] Law professor Harold Lasswell advocated a similar proposal that any newspaper that dominated its community, with little or no effective competition, be forced to run a public forum page that would be centrally edited by a government commission.[243] The purpose of the licensing system was to "assure maintenance in all newspapers of open space and opportunity for free, unhampered expression of opinion by citizens in the community or in the nation, of opinions which differ from those held by publishers and advanced in their papers."[244] Publishing delays on controversial opinions intended to "devitalize" them would be grounds for license revocation.[245] A "Court of Appeals" under the Free Press Authority would act on complaints.[246]

Another popular proposal was that the press be run as a common carrier, with everyone who wanted access to be able to have it by paying a standard rate.[247] Aware that this would encroach on editors' ability to control the content of their papers, some on the Hutchins Commission

237. *Government News Gag Press Freedom Problem*, EDITOR & PUBLISHER, Apr. 8, 1944.
238. *See* Bates, *supra* note 98.
239. *Id.*
240. CHAFEE, *supra* note 119, at 694-95.
241. *Id.* at 695.
242. *Id.* at 694-95.
243. Bates, *supra* note 98.
244. HAROLD L. ICKES, FREEDOM OF THE PRESS TODAY: A CLINICAL EXAMINATION BY 28 SPECIALISTS 130 (1941).
245. *Id.* at 131.
246. *Id.*
247. CHAFEE, *supra* note 119, at 633.

argued that the common carrier idea could square with the First Amendment if it were limited to the newspaper's news functions.[248] The news function was more important than the editorial function because of the "need of the community to know the truth."[249] "When the press comes in as a private news agency to supply that need, the community has to supervise the press and is not prevented from doing so by the First Amendment, which is concerned with the editorial function."[250] In the end, the Commission recommended the common carrier only as an analogue, not as a legal principle.[251] None on the Commission broached government ownership of the press, agreeing that despite the failings of the commercial press, a privately-owned press would better serve the interests of a democratic people than a state owned press.[252]

Chafee led the charge on the Commission against the licensing proposals, which he attacked as "compulsory open-mindedness,"[253] unconstitutionally vague and the "most magnificent opportunity to fetter the press which has ever existed in English speaking countries."[254] Chafee's primary opponent on the Commission was William Hocking, a Harvard philosopher who had promoted the licensing proposals as consistent with the constitutional ideal of "freedom of discussion."[255] Hocking insisted that the Commission make a distinction between freedom of the press and freedom of speech.[256] Hocking believed that editors had the right to free speech on their editorial pages — to print their own arguments and opinions—but freedom of the press meant readers' right to receive adequate news.[257]

Chafee acknowledged that the public had an interest in diverse perspectives in print journalism, and that this interest was consistent with the goals of the First Amendment.[258] But press content could not be compelled by the state consistent with the Constitution.[259] Despite its endorsement of government involvement in broadcasting, the ACLU

248. *Id.*
249. *Id.* at 633.
250. *Id.*
251. *See* Bates, *supra* note 98.
252. *Id.*
253. CHAFEE, *supra* note 119, at 629.
254. *Id.* at 696.
255. On the debate between Chafee and Hocking, see DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 108 (1986).
256. *Id.*
257. *See generally* WILLIAM ERNEST HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS (1947).
258. *See* CHAFEE, *supra* note 119, at 474.
259. *See generally* CHAFEE, *supra* note 119.

shared Chafee's position, arguing that the rationale for regulation of radio—technological medium scarcity—did not apply in the newspaper context and that content-based licensing infringed on freedom of the press.[260] Backed by Morris Ernst of the ACLU, Chafee advocated antitrust law as a content-neutral mechanism to create a greater range of viewpoints in the press through dispersed ownership.[261]

### *B. A "Multitude of Tongues"*

In the *Associated Press* case of 1945, the Supreme Court, while affirming that the public has an interest in news from diverse perspectives and sources, reiterated that government interference with editorial control over content was constitutionally off limits, even if it led to the presentation of public affairs from multiple viewpoints—in a "multitude of tongues."[262] Like Chafee, the *Associated Press* majority endorsed antitrust law as a potential solution to viewpoint homogeneity in the press that was consistent with the First Amendment.

The Associated Press litigation began in 1942, when the Department of Justice filed suit in the District Court in the Southern District of New York against the Associated Press, the largest newsgathering cooperative in the country.[263] Under its bylaws, the AP allowed a newspaper with membership in a given community to prevent another in the same area from obtaining membership by demanding a vote on the competitor's application.[264] The bylaws also required members to supply reports of regional news solely to the Associated Press and prohibited sharing news with nonmembers.[265] It was essentially impossible for a newspaper in this time to succeed without AP membership. The Justice Department alleged that the AP's bylaws were unlawful restraints of trade that limited competition in the newspaper industry in violation of the Sherman Act.[266]

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260. *Id.*

261. *Id.*

262. Assoc. Press v. U.S. Tribune Co., 326 U.S. 1 (1945) (Douglas, J., concurring) (quoting United States v. Assoc. Press., 52 F. Supp. 362, 372 (1943)).

263. *Assoc. Press*, 52 F. Supp. at 373.

264. Margaret A. Blanchard, *The Associated Press Antitrust Suit: A Philosophical Clash Over Ownership of First Amendment Rights*, 61 BUS. HIST. REV. 44 (1987).

265. *Id.*

266. *Id.* at 52. The Justice Department's action had been spurred by the exhortations of department store magnate Marshall Field, who had tried unsuccessfully to obtain Associated Press membership for his new, pro-Roosevelt newspaper the *Chicago Sun.* Field was opposed by publisher Robert McCormick of the *Chicago Tribune*, who was rabidly against the New Deal. McCormick tried to block Field's membership in the Associated Press. After having unsuccessfully

The majority of the three-judge panel, consisting of judges Learned Hand and Augustus Hand, granted the Justice Department's motion for summary judgment without proof of actual exclusion.[267] Rather than question whether a restraint of trade had occurred, Hand used what Chafee advocated as a "public service theory" and distinguished newspapers from other industries, then focused on consumer welfare rather than just the interest of competitors.[268] The opinion suggested that the importance of the news to "the vitality of our democratic government"[269] gave the state a greater interest in supervising the press than other industries. The First Amendment protected the public's interest in the "dissemination of news from as many . . . sources, and with as many different facets and colors as is possible."[270] It "presupposes that [the] right conclusions are . . . likely to be gathered out of a multitude of tongues."[271]

When the ACLU Board became aware of the suit, there was an extended debate about whether to get involved in it. Ernst believed that the case involved important civil liberties issues—the deprivation of the public of information it should have by private forces "creating serious bottlenecks on the news"—and that the organization should become involved.[272] Arthur Garfield Hays, one of the ACLU's founders and a staunch libertarian on freedom of speech, insisted that there was no civil liberties question at stake and that it was neither the business of the Constitution or the ACLU "to make certain that people have equal opportunities" to engage a public audience.[273] Signaling the organization's new trend towards the separation of economic issues and freedom of speech, the ACLU ultimately issued a public statement that

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tried other approaches to winning Associate Press membership, Field asked the Attorney General whether it functioned as a "monopoly in restraint of newspaper competition" and thereby violated the Sherman Antitrust Act. *See Id.* at 50.

267. For a discussion, see generally LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA (1991).

268. *Id.* at 209.

269. Assoc. Press v. U.S. Tribune Co., 326 U.S. 1, 29 (1945) (Douglas, J., concurring).

270. United States v. Assoc. Press, 52 F. Supp. 362, 372 (1943).

271. *Id.* Allowing more papers to receive AP service would seem to foster homogeneity in news content, yet Hand claimed that because every paper had its own way of treating wire service news—some placed it on the front page and others in an "obscure corner," and the accompanying editorials were different—the result of increased access to AP was more "diversity" and therefore greater accuracy. The real issue was that non-AP papers could not survive, which led to further concentration in the publishing industry. *Id.*

272. Letter from Morris Ernst to Roger N. Baldwin (Nov. 6, 1942) (on file with author).

273. Memorandum on the Associated Press Case, ACLU PAPERS (Sept. 23, 1942), *microformed on* American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950, MFILM N.S. 15069, GUIDE JC599 .U5 A445 1996 (Scholarly Res.).

private restrictions on competition in the newspaper field did not create a First Amendment problem but was rather a question of public policy.[274]

The AP appealed to the Supreme Court, arguing that the Sherman Act could not be used against the press, since the First Amendment shielded the press from regulation.[275] The American Newspaper Publishers' Association claimed that if Hand's opinion were sustained, Americans would be confronted "just as the people of Germany today are confronted, with a government controlled press."[276] In June 1945, the U.S. Supreme Court, in an opinion by Justice Black, affirmed that the AP's bylaws violated the Sherman Act and that antitrust law could be applied to news publishing consistent with the First Amendment.[277] The Court rejected Hand's broader "public service" approach to the case and brought it back to a traditional restraint of trade analysis.[278] "Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want."[279] The fact that the commodity was news did not exempt them from the obligations carried by other industries.

The principle that the First Amendment did not foreclose the enforcement of generally applicable business regulations against the press had been established in cases in the 1930s in which publishers had tried to use freedom of the press as a shield against New Deal regulatory measures.[280] In a 1936 case involving the Associated Press, the Court held that the Wagner Act[281] could be used against newspaper publishers without violating freedom of the press.[282] The Wagner Act's prohibition on the discharge of employees on the basis of union affiliation—in this case, editors—did not violate the First Amendment freedom to control editorial content.[283] In 1937, the Court found frivolous a claim that

274. Memorandum, ACLU PAPERS (July 6, 1942), *microformed on* American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950, MFILM N.S. 15069, GUIDE JC599 .U5 A445 1996 (Scholarly Res.).

275. "The flat prohibition against the regulation of the press in one direction, as contained in the First Amendment, does not endow Congress with [the] power to regulate it in another direction, even in aid of its freedom." Brief of the American Newspaper Publishers Association as Amicus Curiae at *9, Assoc. Press v. United States, Nos. 57, 58, 59 (U.S. Oct. 24, 1944), 1944 WL 42542 (Oct. 24, 1944).

276. J. EDWARD GERALD, THE PRESS AND THE CONSTITUTION 1931-1947, at 119 (1948).

277. Assoc. Press v. U.S. Tribune Co., 326 U.S. 1 (1945).

278. *See generally* POWE, *supra* note 267.

279. *Assoc. Press*, 326 U.S. at 7.

280. *See, e.g.*, Assoc. Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 131-33 (1936); Senn v. Tile Layers' Protective Union, 301 U.S. 468, 482 (1937).

281. National Labor Relations Act, 29 U.S.C.A. § 151 (West 1935).

282. *Assoc. Press*, 301 U.S. at 130.

283. *Id.* at 131-33.

newspapers enjoyed a constitutional immunity from a general nondiscriminatory tax.[284]

The decree calling for revision of the bylaws, and forcing the AP to sell on equal terms, did not interfere with editorial functions, Black wrote.[285] It did not force the AP or its members to "permit publication of anything which their 'reason' tells them should not be published. It only provides that after their 'reason' has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication."[286] Moreover, the application of antitrust law to the press furthered the public's interest in diverse viewpoints in journalism, a necessary condition of public discussion. "The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[287] But government compulsion of press content to achieve viewpoint diversity, he emphasized, was anathema to freedom of the press.[288]

Frankfurter, in his concurrence, parted with Black and endorsed the Hand position in its entirety.[289] He suggested that he would have approved more extensive government control over news publishing than other industries because the "truth regarding public matters" was a constitutional interest that was "indispensable"[290] to public discussion and the "vitality of our democratic government."[291] He did not think that the commercial and editorial functions of the press could be disaggregated, and this cut in favor of regulation of all aspects of publishing. "Truth and understanding are not wares like peanuts or potatoes," so restraints on the "promotion of truth"[292] invoked very

284. *See* Giragi v. Moore, 301 U.S. 670 (1937).

285. Assoc. Press v. U.S. Tribune Co., 326 U.S. 1, 20 n.18 (1945).

286. *Id.*

287. *Id.* at 20.

288. The majority opinion observed that the "only compulsion to print which appears in the record" was found in AP's bylaws, which "compel members of the Association to print some AP news or subject themselves to fine or expulsion from membership in the Association." *Id.* at 20 n.18.

289. *Id.* at 26 (Frankfurter, J., concurring).

290. *Id.* at 28.

291. *Assoc. Press*, 326 U.S. at 29. Frankfurter had been highly influenced by popular and academic press criticism. In a 1946 case, Frankfurter complained that "[t]here are today incomparably more effective and more widespread means for the dissemination of ideas and information than in the past. But a steady shrinkage of a diffused ownership raises far reaching questions regarding the meaning of the 'freedom' of a free press." Pennekamp v. Florida, 328 U.S. 331, 355 n.2 (1946). Journalistic codes of ethics, he suggested, were "moonshine" and the press could only be controlled with legal penalties. *See id.* at n.13.

292. *Assoc. Press*, 326 U.S. at 28.

different considerations from comparable restraints on purely commercial industries.[293] Justice Murphy, one of the dissenters along with Stone and Roberts, also saw the different dimensions of publishing as intertwined, but this cut against regulation. Both he and Justice Roberts lamented the decision as "affirmative intervention by the government in the realm of dissemination of information" and a "first step in the shackling of the press, which will subvert the constitutional freedom to print or to withhold, to print as and how one's reason or one's interest dictates."[294]

*Associated Press* ushered in a wave of antitrust enforcement against the press[295] and put the imprimatur of the Court on the media reformers' argument that the public has a constitutional interest in newspaper journalism as a forum for diverse perspectives on public affairs. At the same time, the decision also staked the First Amendment limitations of government regulation of privately owned expressive property, even in the interest of increasing public access to communication opportunities and to information on matters of public concern. Coming on the heels of the *NBC* decision, *Associated Press* affirmed a "dual system" of constitutional freedom of the press. As Lee Bollinger argues, government supervision of radio reflects a commitment to "freedom of discussion," democratic deliberation and government encouragement of a diversity of views, while the broad First Amendment protection given to print journalism embodies a kind of "free speech laissez-faire."[296]

The final report of the Hutchins Commission adopted the *Associated Press* solution, suggesting only the "sparing" use of antitrust laws to further diversity in newspaper ownership and content. Appealing to the newspaper publishing industry's sense of professional responsibility, the Commission asked that the press voluntarily "accept the responsibilities of common carriers of information and discussion," finance media undertakings "of high literary, artistic, or intellectual quality," and "engage in vigorous mutual criticism," as professional but not legal obligations.[297] The Supreme Court, thirty years later in *Miami Herald Publishing Co. v. Tornillo*, channeled the Hutchins Commission

293. One of the most conservative on the Court on freedom of speech in this era, Frankfurter opposed the "preferred position" theory endorsed by his colleagues and used a balancing test that deferred heavily to legislative judgment. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 171 (1981).

294. *Assoc. Press*, 326 U.S. at 48, 51 (Roberts, J. & Murphy, J., dissenting).

295. *See e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

296. *See* BOLLINGER, *supra* note 229, at 110.

297. THE COMMISSION ON FREEDOM OF THE PRESS, *supra* note 104, at 92-94; CHAFEE, *supra* note 119.

when it struck down a right of reply law, concluding that "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[298] Publishers disliked the Commission but acknowledged it, and in the late 1940s the major publishers' associations sponsored several initiatives for editorial reform and committees for self-examination.[299] But by the mid-1950s, it was widely believed that the press had not implemented the Commission's suggestions.[300]

The failure of the campaigns to create public forums in broadcast and print coincided with renewed interest in old-fashioned, face-to-face communication in the traditional public forum. In his *Government and Mass Communications*, Chafee argued that because radio and newspapers could not be used as public information highways—"highroads" for news and ideas, he wrote[301]—the government should provide streets, parks, and auditoriums to promote oral discussion.[302] Outside of the media, there must be essential "physical facilities" for communication accessible to all.[303] Chafee believed that "the construction of a municipal auditorium for public meetings is disconnected with the possibilities of censorship of organized media." "[A]side from the occasional banning of an unpopular speaker or group, harm to free speech is unlikely and positive good is plain."[304]

In a series of cases in the 1940s, the Supreme Court similarly indicated that opportunities for public speech on public property must be protected and facilitated by the state because of limitations on citizens' ability to use the media for communication. This obligation was imposed by the First Amendment. The public forum doctrine reflected the Court's emerging awareness that the "parade, the picket, the leaflet, [and] the sound truck"[305] were the only media of communication

298. 418 U.S. 241, 256 (1974).

299. *See generally* Blanchard, *supra* note 264.

300. The major publishers had also rebelled against the *Associated Press* decision. In 1946, publisher Robert McCormick of the *Chicago Tribune* had convinced a representative from Illinois to introduce a bill in Congress that would exempt cooperative newsgathering associations from the nation's antitrust laws. The ACLU, reversing its earlier position, became involved in the issue and opposed the bill, asserting that newspapers were businesses, and they could not claim exemption from the antitrust laws as long as those laws did not impair "freedom to print and discuss." The Mason bill died in committee in 1947. *See* Blanchard, *supra* note 264, at 70-82.

301. CHAFEE, *supra* note 119, at 479.

302. *Id.*

303. *Id.*

304. *Id.* at 477.

305. Kalven, *supra* note 1, at 30.

accessible to those who lacked "money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places."[306]

## IV. THE PUBLIC FORUM IN PHYSICAL SPACE

### *A. The Public Forum Doctrine*

The public forum doctrine, as articulated by the Supreme Court in the 1940s, protects a minimum right of access to streets, parks and other government-owned sites for expressive purposes.[307] The doctrine grew out of the same cultural environment and concerns as the "public forum" campaigns in broadcast and print. Like the media public forums, the physical public forum would provide communication opportunities for groups and speakers otherwise unable to access the media. Unlike the proposed radio and newspaper public forums, however, the physical public forum was to be governed by the principle of viewpoint neutrality. The forum managers would not engineer debate between competing viewpoints, but would allow free rein to speakers, subject to reasonable time, place, and manner restrictions.[308]

306. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

307. In the public forum context, the Court has recognized that restrictions on the distribution of leaflets and similar means of communication may have a disproportionate effect upon those who, for reasons of finances or ideology, do not have ready access to more conventional means of communication. In such circumstances, the Court has reviewed restrictions on such traditional but unconventional means of communication by a more stringent standard than other content-neutral restrictions.

Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. MARY L. REV. 189, 219 (1983).

308. The central principle of the public forum, as articulated in the foundational cases of the 1940s, has been much debated. Some have argued that the essence of the public forum was equal access. The state can entirely ban access to the forum but it cannot selectively open it to some speakers and not others. Professor Lillian BeVier has written that the public forum cases adopt "no norm or idealized vision of quality or quantity of public debate except that which results from . . . government neutrality." BeVier, *supra* note 2, at 102. Kenneth Karst has argued that the "equality principle" of the First Amendment—that freedom of speech protects equal liberty of ideas—was developed in the public forum cases. Karst, *supra* note 191.

But it is clear that the Court also adopted a minimum access principle—that the state must, "even at some cost to the public fisc, have to provide at least a minimally adequate opportunity for the exercise of certain freedoms." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786, 979-80 (2d ed. 1988). Franklyn Haiman has described the public forum as a kind of "affirmative action" for speech. Government enhancement of citizen expression by "making available public sidewalks, streets, and parks for speeches or demonstrations" has "long been recognized as a minimal contribution expected of the state to the facilitation of a marketplace of ideas." FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 297-98 (1981).

The foundational case is *Hague v. Committee for Industrial Organization*, from 1939.[309] *Hague* involved efforts by notorious Jersey City Mayor Frank Hague to quash the CIO through a statute that prohibited the distribution of pamphlets in public places, and forbade unions leasing public halls for public meetings unless they received a permit, which was at the discretion of city officials.[310] There was also an ordinance that required hall owners to obtain a rental permit that was also at the discretion of city officials.[311] Most cities did not require permits for the renting of private halls, but owners who rented halls to radicals sometimes found their licenses revoked because of the "structural . . . condition" of the building.[312]

Before *Hague*, ordinances allowing the discretionary awarding of permits for public speech, and closing off all public spaces for speech, had been routinely upheld by courts as a legitimate exercise of the police power.[313] The state had the rights of a private property owner. In the famous 1895 case *Davis v. Massachusetts*, Oliver Wendell Holmes, as Chief Justice of Massachusetts' highest court, declared that laws that prohibited public speaking in a public park were no more an infringement of the rights of the public than "for the owner of a private house to forbid it in his house."[314] Courts were not sympathetic to claims that access to public space was necessary for the exercise of free speech rights, or that it was especially vital for minority groups who lacked access to the press.[315]

In *Hague*, the Court transformed the state from the owner of the streets and parks to the trustee of such public places, to which it must provide minimum access on an equal and nondiscriminatory basis, regardless of viewpoint.[316] In dictum, Justice Roberts, writing for the plurality, observed that the use of the streets and parks, "immemorially . . . held in trust for the use of the public," was for "[the] purposes of assembly, communicating thoughts between citizens, and discussing public questions" an essential part of the "privileges, immunities, rights, and liberties of citizens."[317] The rights of speakers, however, were still

309. 307 U.S. 496 (1939).

310. *Id.* at 500-03.

311. *Id.*

312. *See Public Order and the Right of Assembly in England and the United States: A Comparative Study*, 47 YALE L.J. 404, 421 (1938).

313. *See, e.g.*, Commonwealth v. Davis, 162 Mass. 510 (Sup. Jud. Ct. of Mass. 1895).

314. *Id.* at 511.

315. *See* Pfohl, *supra* note 2, at 549.

316. Hague v. Comm. for Indus. Org., 307 U.S. 496, 514-15 (1939).

317. *Id.* at 515.

subordinate to the state's power to regulate for the public good. The privilege of a citizen to

> use the streets and parks for communication of views on national questions may be regulated in the interest[s] of all . . . it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, . . . but it must not, in the guise of regulation, be abridged or denied.[318]

The state could not entirely close access to the public forum, *Hague* suggested, nor use permitting systems as a guise for content-based discrimination. The ordinances were void on their face because they were not passed to serve the general welfare and placed uncontrolled discretion in the hands of local officials to commit "arbitrary suppression of [the] free expression of views on national affairs."[319]

The public forum doctrine was subsequently developed by the Court in a series of cases involving traditional forms of public communication in public places. In four cases consolidated in *Schneider v. State of New Jersey*, from 1939, involving the convictions of labor protesters, political radicals, and Jehovah's Witnesses, the Court struck down local ordinances that made it unlawful for any person to circulate or distribute handbills on any sidewalk, street, or public place.[320] Although the state may implement reasonable time, place, and manner restrictions, the Court held, it cannot entirely block citizen access to traditional public forums for speech, nor resolve competing claims of access in a discriminatory manner.[321] As Harry Kalven Jr. wrote years later, summarizing the doctrine,

> In an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.[322]

Professor Robert Post has argued that the public forum concept demonstrated a general concern with official suppression of participation

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318. *Id.* at 515-16.

319. *Id.* at 516.

320. Schneider v. Town of Irvington, 308 U.S. 147 (1939). A 1941 study observed that of the fifty-five handbill cases that were brought throughout the country during the previous fifty years, Jehovah's Witnesses, labor unions and minority political groups were defendants in most of the cases. *See* James K. Lindsay, *Council and Court: The Handbill Ordinances, 1889-1939*, MICH. L. REV. 561, 590 (1941).

321. *Id.* at 150..

322. Kalven, *supra* note 1, at 11-12.

in public discourse rather than a more specific interest in the flourishing of public speech in public places.[323] He points out that the public forum cases technically imposed the same kind of restrictions on the government's ability to regulate speech in circumstances that did not involve public forums.[324] "The Court held that street demonstrations could not be [held] . . . to the whim of official discretion," but it applied the same standard to distribution of pamphlets to private homes, and speech in private halls.[325] "In short," he writes, "the precedents indicate that the Court's primary concern was to protect [communication] . . . and that the geographical location of . . . [the communication] played a relatively minor role in that concern."[326] Given the historical context, the focus on streets, parks, and town squares has more significance than Post has ascribed to it.

We must remember the widespread concern in this era with the disappearance of traditional public space and local communities in the face of nationalizing, urbanizing, modernizing forces. Critics had claimed that as citizens retreated to their private homes to consume radio and newspapers, public discussion and community spaces for discussion were abandoned. Asserting a right to speak on the street was a statement about the continued value of public space and the importance of articulating ideas in a face-to-face context. Kalven believed that these cases "recognize[d] the special nature and value of [that] . . . claim to be on the street."[327] In *Schneider*, the majority rejected the argument that the ordinances were limited to streets and alleys, leaving other places for speech open.[328] "The streets are natural and proper places for the dissemination of information and opinion," the majority stated.[329] The Court saw the street as a "kind of public hall," in Kalven's words, "a public communication facility" bearing democratic significance and the weight of historical tradition.[330]

Given their likely inability to speak through the press and radio, for marginalized and oppressed groups, public spaces are an essential means of communication. This was argued by the Bill of Rights Committee of the American Bar Association, a group of liberal lawyers and law professors that included Zechariah Chafee, in an amicus brief filed in

323. Post, *supra* note 2, at 202-05.
324. *Id.*
325. *Id.* at 202-03
326. *Id.* at 203.
327. Kalven, *supra* note 1, at 19.
328. Schneider v. Town of Irvington, 308 U.S. 147, 159-60 (1939).
329. *Id.* at 163.
330. Kalven, *supra* note 1, at 12.

*Hague*.[331] The brief, which the Court noted and made use of, argued that "in view of the importance of the open air meeting as a[332] . . . vitally important medium of public discussion,"[333] the city must "in some adequate manner provide places"[334] for public meetings because groups and individuals promoting unpopular causes generally "do not have the financial means to . . . purchase time on the radio."[335] Speeches in "municipal auditoriums, church forums, and parks in summer"[336] did not require funds to access, and therefore had a "special function in the field of free expression that is fulfilled by no other medium."[337]

The trial court had used similar reasoning when it enjoined Jersey City officials from interfering with the union's distribution of leaflets and circulars.

> The communication of thought, unless you believe in mind-reading, requires some mechanical means. In the case of speech, one needs some place to speak in and some people to listen. The public meeting has been called the "platform of the poor." Lacking the money or perhaps in Jersey City the goodwill, sufficient to obtain some private place, the would-be orators are forced to resort to publicly owned places.[338]

The Third Circuit, affirming, noted that public spaces "must be open" for the use of the people to exercise their rights of free speech and assembly.[339] "If this were not so it is obvious that these rights would be but empty forms" for those unable to access privately owned means of expression.[340]

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331. Brief of the Committee on the Bill of Rights, American Bar Association, Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (No. 651), 1939 WL 48753.

332. *Id.* at *26.

333. *Id.* at *5.

334. *Id.* at *31.

335. *Id.* at *28.

336. *See generally id.*

337. Brief of the Committee on the Bill of Rights, *supra* note 331, at *27.

> Public debate and discussion take many forms including the spoken and the printed word, the radio, and the screen. But . . . assemblies face to face perform a function of vital significance in the American system, and are no less important at the present time for the education of the public and the formation of opinion than they have been in our past history.

*Id.* at *7. The brief also called for the establishment of "Hyde Parks" of sufficient number and "so located as to provide effectively for free outdoor public discussion." *Id.* at *31.

338. Comm. for Indus. Org. v. Hague, 25 F. Supp. 127, 145 (1939).

339. Hague v. Comm. for Indus. Org., 101 F.2d 774, 785 (1939).

340. *Id.*

This view of the public forum as the "platform for the poor" was articulated in two prominent postwar cases involving loudspeaker speech. *Saia v. New York,* from 1948, involved a Jehovah's Witness who gave lectures in the public park in Lockport, New York using sound equipment mounted atop his car.[341] He was arrested under an ordinance that gave the Chief of Police discretion to reject applications for the use of loudspeaker equipment.[342] In the immediate postwar era, the dispute between municipalities and various political and religious groups over the use of loudspeakers became a grassroots battle for civil liberties waged in parks and on the sidewalks and streets. In New York, groups ranging from labor unions to the National Republican Club challenged regulations on sound trucks and sound amplifiers that required would-be users to obtain permits from the police department.[343] Protesters without permits took to the streets and read the First Amendment using amplifying equipment until they were arrested.[344]

The majority in *Saia* struck down the ordinance on the grounds that it sanctioned uncontrolled discretion by officials and hence discriminatory access to the public forum.[345] The power to approve or deny applications gave officials the ability to conduct unconstitutional content-based discrimination of speech.[346] The law, which had the same effect as a prior restraint, was a device for the "suppression of free communication of ideas."[347] It could be used to deny unpopular groups access to what was for them a crucially important medium of expression. Particularly for those without access to the media, loudspeakers are "today indispensable instruments of effective public speech," Justice Douglas observed.[348] As Saia's lawyer had written, "the radio, [and] the public press"[349] were accessible only to the highest bidder. If the mass

341. Saia v. NewYork, 334 U.S. 558, 560-62 (1948).

342. *Id.* at 558-59.

343. *See, e.g*,. *Saia*, 334 U.S. 558; *Test of Sound Truck Ban is Noisy Despite Polite Police and Pickets*, N.Y. TIMES, June 11, 1948; *Loudspeaker Ban Is Fought by ALP*, N.Y. TIMES, Sept. 17, 1948.

344. *See Test of Sound Truck Ban is Noisy Despite Polite Police and Pickets*, *supra* note 343; *Loudspeaker Ban Is Fought by ALP*, *supra* note 343.

345. *Saia*, 334 U.S. at 560-62.

346. *Id.*

347. *Id.* at 562.

348. *Id.* at 561.

349. *See* Brief for Appellant at *5, Saia v. New York, 334 U.S. 558 (1948) (No. 504), 1948 WL 47556.

media were the sole outlets for public speech, then "free speech [was] not available."[350]

This was the argument of the dissent the following year in *Kovacs v. Cooper*, in which a plurality led by Justice Reed rejected *Saia*'s theory of the public forum.[351] The Court upheld a Trenton, New Jersey city ordinance that, in the stated interests of preventing the nuisance of noise pollution, barred the use of loudspeakers mounted on any vehicle on the city's public streets.[352] Kovacs had been arrested under the statute for using a sound truck to publicize a labor dispute.[353] The plurality distinguished *Saia* because the Trenton ordinance applied across the board to all loudspeaker use and thus avoided the problem of invidious discretion.[354] A city could constitutionally close the public forum to all loudspeaker use, because loudspeakers forced speech on unwilling listeners and impaired the state's interest in public order.[355] The plurality acknowledged that "sound trucks, perhaps borrowed without cost from some zealous supporter[s]"[356] allowed minority groups to reach large audiences but rejected the argument that they were necessary for communication when other "easy means of publicity are open," such as "the human voice," "pamphlets,"[357] and "radio."[358]

The dissent by Black, Douglas and Rutledge argued that the plurality position violated the First Amendment requirement of minimum access to the public forum.[359] The notion that minority groups could easily get time on the radio was entirely false. "There are many people who have ideas that they wish to disseminate but who do not have enough money"[360] to "obtain the support of newspapers" or "to buy advertising from newspapers, radios, or moving pictures."[361] "Everybody knows [that] . . . these powerful channels of communication . . . from the very nature of our economic system, must be under the control and guidance of comparatively few people."[362] Media owners

350. *Id. See also* Morrie Benson & Edward S. Resnick, *Sound Amplifiers: Nuisance or Free Speech?*, 2 U. FLA. L. REV. 103 (1949).
351. Kovacs v. Cooper, 336 U.S. 77, 102 (1949).
352. *Id.* at 78.
353. *Id.* at 79.
354. *Id.* at 82-85.
355. *Id.*
356. *Id.* at 88.
357. *Id.* at 89.
358. *Id.*
359. *Id.* at 103 (Black, J., dissenting).
360. *Id.* at 102 (Black, J., dissenting).
361. *Id.* at 103 (Black, J., dissenting).
362. *Id.* at 102 (Black, J., dissenting).

would never give fair coverage to ideas they opposed, held by those without "wealth and power."[363]

Laws that prohibited non-media speakers from being able to reach a public audience gave "preference" in the dissemination of ideas to the "owners of legally favored instruments of communication"[364] and perpetuated economic and political inequalities by "tip[ping] the scales against the transmission of ideas through public speaking,"[365] the dissent wrote. Without access to the public forum, minority groups would be voiceless. Without the ability to use loudspeakers, they would be drowned out by the media. The effect of the decision was to add to the "overpowering influence" of mass media in the marketplace of ideas.[366] The dissent argued, in effect, that the right to free expression included a right to effective expression—as ACLU lawyers described it, the right "of a man to *communicate* his thoughts to his fellows, and not alone the right to express those thoughts."[367]

### *B. Embodied Communication*

During this era of critical concern with modernity's transformation of social relations and the geography of everyday life, the Court acknowledged that the marketplace of ideas is not only a metaphor—at one point, it was really a *place*. It suggested that in-person speech in the public forum, in contrast to disembodied mass communication, provokes personal relationships and deep engagement with other citizens and critical issues in a way that mass communications cannot. Traditional forms of communication were well-suited to the purposes of minority political and religious groups seeking to confront, persuade, and challenge entrenched majoritarian thought. The Court recognized, to use a phrase not yet in common parlance, that the "medium is the message"—the forms and contexts of speech have communicative impact, which must be taken into consideration when determining the validity of any regulation of speech.[368]

363. *Id.* at 104 (Black, J., dissenting).

364. *Id.* at 102 (Black, J., dissenting).

365. *Id.* at 103 (Black, J., dissenting).

366. *Id.* at 102 (Black, J., dissenting).

367. Brief for Respondent at 43, Hague v. Comm. for Indus. Org., 25 F.Supp. 127 (1939) (No. 651), 1939 WL 48838 at *43.

368. As Justice Jackson wrote in *Kovacs*, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses, and dangers. Each…is a law unto itself." 336 U.S. at 97 (Jackson, J., concurring).

The Court recognized the particular importance of access to the public forum for religious proselytizers who depended on classical free expression activities like pamphleting.[369] Pamphleting was not only an inexpensive means of communication for those without access to the mass media, but it had particular persuasive power—the physical presence of the pamphleteer forced audiences to confront the message. In a series of decisions involving challenges to local anti-pamphleting ordinances,[370] the Court stated that the First Amendment protects the use of public streets and parks for the distribution of pamphlets, and that freedom of the press extended to pamphlets and leaflets. The press "comprehends every sort of publication which affords a vehicle of information and opinion."[371] Pamphleting, Justice Black observed in *Martin v. City of Struthers, Ohio*, was essential to "the poorly financed causes of little people"[372]—"the pamphlet, an historic weapon against oppression, is today the convenient vehicle of those with limited resources because newspaper space and radio time are expensive and the cost of establishing such enterprises great."[373]

The public forum not only invites a clash of opinion but sometimes a clash of tempers. *Cantwell v. Connecticut*, from 1940, struck down the conviction under a breach of peace statute of a Jehovah's Witness who stood on the sidewalk and played records to passers-by.[374] The listeners were outraged almost to the point of violence. Recognizing the importance of confrontational in-person communication to the Witnesses, who pursued their project of conversion through face-to-face contact, the majority noted that despite the hostile audience reaction, Cantwell had a right to be on the public street and a "right peacefully to impart his views to others."[375] Similarly, the 1949 case *Terminiello v. Chicago* invalidated the conviction of a racist street-corner speaker

369. Dissenting in a 1941 case before the D.C. Circuit Court of Appeals that had upheld a license tax on the distribution of pamphlets, future Justice Wiley Rutledge, appointed to the Supreme Court in 1943, argued that the tax "b[ore] most heavily on persons least able to afford it and most in need of avenues of free communication . . . who do not have the money to buy radio time and newspaper space." Busey v. D.C., 129 F.2d. 24, 37 (1941) (Rutledge, J., dissenting). The license tax "closes their only avenue to public attention." *Id.*

370. *See* William A. Elias, Jr., *The Jehovah's Witnesses Cases*, 16 U. KAN. CITY L. REV. 140 (1948).

371. The press "comprehends every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, Ga., 303 U.S. 444, 452 (1939).

372. 319 U.S. 141, 146 (1943).

373. Jones v. Opelika, 316 U.S. 584, 619 (1942) (Murphy, J., dissenting).

374. 310 U.S. 296 (1940).

375. *Id.* at 308.

under a statute that prohibited public speech that created unrest.[376] The majority opinion noted that face-to-face speech was more likely to "create dissatisfaction" or even "stir[] people to anger" than messages communicated through radio or newspapers.[377] But a major purpose of freedom of speech was to invite impassioned dispute, Justice Douglas wrote.[378] However, in some situations, the Court suggested, the visceral and confrontational nature of in-person communication made it incompatible with discursive aims of the public forum.[379]

Beginning with *Thornhill v. Alabama* in 1941,[380] a series of cases granted peaceful labor picketing the status of First Amendment protected speech, overturning the earlier position that picketing, thought to be an inherently violent activity, was a form of "conduct" rather than speech.[381] The Court's movement in this direction was spurred, in part, by the Norris La Guardia Act of 1932,[382] along with the subsequent "little Norris La Guardia Acts" passed by states, which had described labor picketing as conduct, but sanctioned it when it was used for a lawful purpose in a labor dispute.[383] In a 1937 case, *Senn v. Tile Layers' Protective Union*, the Court, upholding Wisconsin's little Norris LaGuardia law, first referred to picketing as a form of speech, not conduct.[384] It did so, in part, by characterizing picketing as the laborer's equivalent of newspaper advertisements. "In declaring such picketing

376. 337 U.S. 1 (1949).

377. *Id.* at 4.

378. *Id.* "It may indeed best serve its high purpose when it induces a condition of unrest." *Id.*

379. Chaplinksy v. New Hampshire, 315 U.S. 568, 573-74 (1942). In *Chaplinsky*, the majority upheld a conviction of a public speaker under a state law that prohibited "face-to-face words plainly likely to cause a breach of the peace by the addressee." *Id.* at 573. The majority noted that certain kinds of hostile in-person speech, when they are directed at a person with the intent to provoke a fight, can be so powerful as to constitute incitement to action. *Id*. at 571-72. *Chaplinsky* is the only case in which the Court has invoked the fighting words principle. *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH U. L. Q. 531 (1980).

380. Thornhill v. Alabama, 310 U.S. 88 (1941).

381. *See* Am. Fed'n of Labor v. Swing, 312 U.S. 321 (1941) (finding First Amendment protects peaceful picketing disentangled from violence). After 1937, the Court increasingly sided with unions, a major part of the New Deal coalition. The labor movement also reconceptualized its struggle, in part, as a quest for free expression—the right "to organize, strike, meet and picket." *See* Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV. 291, 302 (1994) (quoting the ACLU).

382. 29 U.S.C. § 101 (1932).

383. Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, 8 U. PA. J. CONST. L. 255 (2002).

384. Senn v. Tile Layers' Protective Union, 301 U.S. 468, 482 (1937).

permissible," Justice Brandeis had written, "Wisconsin has put this means of publicity on . . . par with advertisements in the press."[385]

But in a series of cases in the 1940s, the Court whittled down *Thornhill*'s broad protection for picketing, designating picketing as "speech plus"—speech enmeshed with threatening or violent physical conduct.[386] The conduct elements were not First Amendment "speech."[387] Labor lawyers questioned why the dissemination of facts about a labor dispute on a sign carried by a picket might considered to be conduct, when the same words would be seen as relatively harmless if they appeared in pamphlets, in newspapers, or were broadcast over the radio.[388] "If [a] union can constitutionally state its message on the radio, in a newspaper advertisement, in a leaflet, or by mail, why may it not constitutionally use a placard for the same purpose, and carry that placard wherever citizens may lawfully be?"[389] The ability to persuade audiences was the key to good advertising and good journalism; there was thus "no distinction between picketing and other means of [the] dissemination of information."[390]

Yet the Court never reverted back to its earlier position that labor picketing was unprotected by freedom of speech. This may have been spurred, in part, by the Court's awareness of the anti-labor bias of the major media outlets. The CIO leaders in Jersey City had tried to go on the radio, but they were banned from the networks.[391] The union was only able to purchase time on a low-power New York station run by the

385. *Id.* at 479.

386. The Court did not indicate clear standards for separating speech from conduct but suggested that picketing was more likely to be classified as conduct when it was "enmeshed with contemporaneously violent conduct" or imminently likely to persuade viewers to commit violence. Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 292-93 (1941). As Frankfurter wrote in the majority opinion in *Milk Wagon Drivers Union Local 753*, "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.* at 293.

387. As Justice Douglas noted in *Bakery & Pastry Drivers & Helpers Local 802 of International Brotherhood of Teamsters v. Wohl* (1941), picketing by an organized group was more like conduct than speech, since "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." 315 U.S. 769, 776 (1942) (Douglas, J., concurring). In such a case, "the effect may cease to be persuasion and become intimidation and incitement to violence." Youngdahl v. Rainfair, 355 U.S. 131, 138 (1957). *See* Louis L. Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037 (1942).

388. Brief of Nat'l Lawyers Guild at 5, Carpenters & Joiners Union of Am. v. Ritter's Café, 315 U.S. 722 (1942) (No. 527), 1942 WL 53602 at *5.

389. *Id.*

390. Brief of Cong. Indus. Org. at 6, Carpenters & Joiners Union of Am. v. Ritter's Café, 315 U.S. 722 (1942) (No. 527), 1941 WL 52808 at *6.

391. Nathan Godfried, WCFL, CHICAGO'S VOICE OF LABOR 1926-78 197 (1997).

Socialist party.[392] As Frankfurter had observed, picketing was the "working man's means of communication."[393] Douglas and Black had noted the importance of labor's access to public spaces for picketing in light of the prohibitively "great[] expense" necessary for unions to reach "the public over the radio or through the newspapers."[394] Picketing was workers' sole means of "tell[ing] their side of the story" to the people.[395]

### *C. The Public Forum Principle*

The right to the public forum was, of course, an exceedingly limited means of promoting the expression of disempowered groups. It applied only to public property and therefore only to traditional means of communication. There was no "First Amendment easement" to private property. In 1946, the Court made one important exception in *Marsh v. Alabama*, in which it assimilated private property to the status of public property when it served a public function.[396] In *Marsh*, the Court held that an Alabama anti-trespass statute that prohibited distributing literature on sidewalks could not be used to prevent the distribution of religious pamphlets on the sidewalks of a company town, even though they were privately owned. The sidewalks served a public function because they were the only venues in the town that could serve as public forums for communication. "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such [a] manner that the channels of communication remain free," Justice Black wrote.[397] But *Marsh* did not extend to the privately-owned communications media, leaving disadvantaged speakers without access to the most effective forms of communication.

It has been said that the public forum doctrine reflected the Court's insensitivity to the problem of citizens "getting ideas before a forum."[398] Poor and unpopular speakers unable to access the media were relegated to the least useful forms of communication. Even in the 1940s, pamphlets and pickets "were as efficacious in a world flooded by the

392. *Id.*

393. Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 293 (1941).

394. Carpenters and Joiners Union of Am. Local No. 213 v. Ritter's Café, 315 U.S. 722, 732 (1942) (Black, J., dissenting).

395. *Milk Wagon Drivers Union Local 753*, 312 U.S. at 320 (Black, J., dissenting).

396. 326 U.S. 501 (1946).

397. *Id.* at 507.

398. *See* Barron, *supra* note 3, at 1652.

communications of mass media as a blacksmith's forge in an era of mass industrialization," J.M. Balkin has written.[399] Indeed, the members of the Court were undoubtedly aware that these traditional modes of communication could not compete with the media for a public audience. The "right to the streets" as a way of democratizing communication was in a sense rhetorical and aspirational. Nonetheless, the public forum doctrine represented an initial acknowledgement of the ways that economic inequalities became speech inequalities in the media age, reinforcing the exclusion and disempowerment of marginalized groups. It suggested a new recognition of the conflict between mass communications and the ideal of public discussion.

## V. CONCLUSION

At a moment of profound and dislocating social transformation, Americans in the 1930s and 1940s tried to reconcile their dependence on mass communications with the media's threat to public discourse. They attempted to contain a powerful force that was seen as both hostile to the modern social order and yet absolutely essential to it. "Public forums" on the radio and in newspapers would help restore possibilities for democratic discussion that the mass media had impaired. The physical public forum, by providing a "soapbox for the poor," would reinvigorate the tradition of face-to-face public debate in the town square. The public forum movement advocated new visions of the role and responsibility of the state in creating the conditions for public discourse and the meaning of democratic communication in the mass media age.

In the postwar era, the link between lack of access to the media and the need for a "First Amendment easement" to public places was still salient for members of the Supreme Court. Yet this connection came up most often in dissents, signaling the Court's retreat from its earlier, broad view of the public forum. In 1965, in his dissent in *Adderley v. Florida*, involving arrests for civil rights protests in front of a jailhouse, Justice Douglas reiterated the necessity of the public forum for "[t]hose who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets."[400] In his dissent in the 1972 case *Lloyd Corp. v. Tanner*, which overturned a 1968 decision that had suggested possible public forum status for shopping malls, Justice Marshall observed that,

399. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 375, 405 (1990).

400. 385 U.S. 39, 50-51 (1966) (Douglas, J., dissenting).

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found.[401]

In the dispersed, suburban nation that the United States had become by that time, the shopping center was the public forum.

The 1970s marked the beginning of the end of the public forum, as the public forum doctrine crystallized into a complex set of rules that granted the government substantial authority to control the expressive uses of its own property and to declare sites off limits for public speech.[402] Outside of "traditional" public forums, such as streets and parks, whether or not government property can be classified as a public forum depends on government intent. Speech can be banned in sites the government deems "nonpublic." The earlier view of a state obligation to provide citizens with minimum communication opportunities was replaced by a strict rule of equal access that allowed flat bans on access to the forum as long as it was done evenhandedly.[403]

During the 1960s and 1970s, the increasing judicial hostility to a broad definition of the public forum, suburbanization and the demise of urban public places, the civil rights movement's problems accessing the media, and public outcry over racial biases in media presentation, spurred a renewed media reform movement. This effort, largely identified with the work of law professor Jerome Barron, was in many ways the continuation of the efforts of the 1930s and 1940s. In a famous article in the *Harvard Law Review*, Professor Barron, referencing the struggles of the civil rights protesters, argued that "the interests of those

401. 407 U.S. 551, 580-81 (1972). In the 1968 case, *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, involving labor picketers' right to access a privately owned shopping mall, the Court applied the minimum access requirements of the traditional public forum because the shopping center, in a suburbanized nation, was the functional equivalent of the streets and sidewalks of a municipal business district. 391 U.S. 308 (1968). "The largescale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center." *Id.* at 324-25.

402. On the transformation of the public forum doctrine in the 1970s and after, see G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949 (1991); Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739 (1991); David S. Day, *The End of the Public Forum Doctrine,* 78 IOWA. L. REV. 143 (1992).

403. *See* BeVier, *supra* note 2; *see also* Sheila M. Cahill, Note, *The Public Forum: Minimum Access, Equal Access and the First Amendment*, 28 STAN L. REV 117 (1975).

who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view."[404] Barron proposed a judicial remedy granting individuals and groups who wanted to voice their opinions on public affairs a right of nondiscriminatory access to the community newspaper, and a federal right of access statute, on the theory that newspapers assumed a quasi-public function.[405] Barron had been encouraged by the Supreme Court's decision in the *Red Lion Broadcasting* case of 1969, which upheld the constitutionality of the Fairness Doctrine under a scarcity theory.[406] In the radio context, freedom of speech protected not only the rights of speakers, but also the interests of listeners in hearing diverse points of view.[407] In a sequence of events reminiscent of twenty-five years earlier, Barron tried to use the *Red Lion* rationale to defend a challenged newspaper right of reply law.[408] He was defeated in *Miami Herald Publishing Co. v. Tornillo*.[409] While state-managed "public forums" in radio were consistent with the First Amendment, the Court held, freedom of the press did not permit government encroachment on editors' prerogative to control the content of their papers.[410]

During the last quarter of the twentieth century, the public interest requirements in broadcasting that had equated public service with ideological diversity and balance were also progressively dismantled. In 1972, the Court upheld an FCC ruling that stated that a broadcaster could implement a flat ban on paid public service advertisements without running afoul of the fairness doctrine.[411] Justice Brennan's observation—that "the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency"[412]—did not command the sympathy of a majority. During the 1980s, sweeping deregulatory efforts at the FCC led to the elimination of many of the public interest broadcast requirements

404. Barron, *supra* note 3, at 1656.

405. *Id.* at 1666-69.

406. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

407. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

408. Barron, *supra* note 3, at 1667-77.

409. 418 U.S. 241 (1974).

410. *Id.* at 258.

411. *Columbia Broad. Sys.*, Inc., 412 U.S. 94.

412. *Id.* at 193 (Brennan, J., dissenting).

articulated in the 1940s.[413] Academic commentators' efforts to implement stronger public interest standards have been unavailing.[414]

An ongoing media reform movement continues to attack the corporatization and concentrated ownership of the mass media and maintains that the lack of public access to the means of communication is the single greatest threat to freedom of speech and participatory democracy.[415] This critique has been complicated by the advent of the internet. This is not the place to engage with the many arguments that have been made about whether and how the internet can be democratized and made into an authentic public forum.[416] It is to suggest, however, that the question may be as pressing for us as it was for the American people in the first communications revolution. As Balkin summarizes, digital media make "possible widespread cultural participation and interaction that previously could not have existed on the same scale. At the same time, . . . [they] create[] new opportunities for limiting and controlling those forms of cultural participation and interaction."[417] The internet provides potentially the "greatest forum for communication and expression the world has ever seen," but it is subject to the control of a handful of "dominant, private" industries that are under no duty to facilitate communication and expression.[418] The ideal described by the Hutchins Commission—a community bound together by equal participation in discussion and the exchange of ideas—may be more distant than it was when the Commission wrote.[419] The public forum campaigns of the 1930s and 1940s, however flawed and incomplete they may have been, can provide a touchstone for our own efforts to democratize speech in a world where communication is everywhere but meaningful public discussion arguably remains elusive.

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413. *See generally* Varona, *supra* note 136.

414. *See* Varona, *supra* note 136, at 159-61.

415. *See, e.g.*, Robert W. McChesney, *Freedom of the Press for Whom? The Question to Be Answered in Our Critical Juncture*, 35 HOFSTRA L. R. 1435 (2007).

416. *See, e.g.*, Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 Ohio St. L.J. 1535 (1998); Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV J.L.& TECH. 149 (1998). Sunstein proposes the creation of "deliberative domains" on the internet, sites devoted to facilitating the exchange of ideas. *See generally* SUNSTEIN, *supra* note 14.

417. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society,* 79 N.Y.U. L. REV 1, 3 (2004).

418. DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE xiii (2009).

419. *See generally* THE COMMISSION ON FREEDOM OF THE PRESS, *supra* note 104.